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What Changes Are Most Needed in the Procedures Used in the United States Justice System?

National Debate Topic for High Schools
1983-1984

Pursuant to Public Law 88-246

Compiled by the Congressional Research Service
Library of Congress

S920-4

PUBLIC LAW 88-246, 88TH CONGRESS, S. 2311,
DECEMBER 30, 1963

AN ACT To provide for the preparation and printing of compilations of materials relating to annual national high school and college debate topics.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Librarian of Congress is authorized and directed to prepare compilations of pertinent excerpts, bibliographical references, and other appropriate materials relating to (1) the subject selected annually by the National University Extension Association as the national high school debate topic and (2) the subject selected annually by the American Speech Association as the national college debate topic. In preparing such compilations the Librarian shall include materials which in his judgment are representative of, and give equal emphasis to, the opposing points of view on the respective topics.

Sec. 2. The compilations on the high school debate topics shall be printed as Senate documents and the compilations on the college debate topics shall be printed as House documents, the cost of which shall be charged to the congressional allotment for printing and binding. Additional copies of such documents may be printed in such quantities and distributed in such manner as the Joint Committee on Printing directs.

Approved December 30, 1963.

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Congressional Research Service
The Library of Congress

Washington, D.C. 20540

FOREWORD

The 1983-1984 high school debate topic is, "What changes are most needed in the procedures used in the United States justice system?" Three debate propositions within this topic have been selected. These are:

> Resolved: That the United States should adopt uniform rules governing the criminal investigation procedure of all public law enforcement agencies in the Nation;
>
> Resolved: That the United States should establish uniform rules governing the procedure of all civil courts in the Nation; and
>
> Resolved: That the United States should establish uniform rules governing the procedure of all criminal courts in the Nation.

This volume has been prepared to assist in the exploration of these issues It begins with writings chosen to provide an overview of the judiciary and the justice system and to place the topic and the three propositions in their proper context. Separate collections of essays and background materials on each of the debate propositions follow the material of general applicability. Also included in the volume are a selected bibliography, a list of available government publications related to the topic and the propositions, and a research guide to aid in the exploration of additional information sources. In selecting items for this reader and bibliography, the Congressional Research Service (CRS) has attempted to sample the wide spectrum of opinions reflected in current literature on these questions. No preference for any policy is indicated by the selection or positioning of articles herein, nor should one infer CRS disapproval of any policy or article not included.

Staff members of the American Law Division and the Library Services Division of CRS cooperated in the compilation of these materials. The preparation of this volume was coordinated by Sherry B. Shapiro and Elizabeth B. Bazan. Ms. Shapiro also prepared the bibliography and information on additional resources. George H. Walser selected materials for a portion of the bibliography and reviewed the product for bibliographic form and consistency. Barbara Sanders secured copyright permissions. Richard Gigax assisted in the administration of the project. John M. White, with the assistance of Lisa Barker, C. Lee Burwssser, Kenneth J. Cockrell, Eleanor Conner, Ken Martini, and Paula Murphy contributed to the compilation and production of the volume.

The Congressional Research Service wishes to express its appreciation to those copyright holders that have granted permission for the reproduction of materials. Such permission is acknowledged in each instance.

Good luck to each debater in researching, preparing, and presenting arguments on this year's topic.

Gilbert Gude

Gilbert Gude
Director, Congressional Research Service

INTRODUCTION

This manual is designed to aid preparations for the 1983-1984 high school debate competition. Information is provided below to assist each debater in making full use of the materials contained in this volume.

The manual consists of readings, bibliographic references, and a guide to additional search tools. The first group of readings was selected to provide a general overview of the United States justice system, including the courts on both the State and Federal levels. These should lay a foundation for a study of the general topic and provide a basis from which the research on each of the debate propositions may be launched. Subsequent selections are tailored to each of the specific propositions. They focus, for example, on issues such as investigative techniques, the exclusionary rule and its repercussions on search and seizure procedures, civil discovery, commentaries on various aspects of the Federal Rules of Civil Procedure and local rules, sentencing reform, plea negotiations, and due process in criminal proceedings.

Similarly, citations in the bibliography have been chosen to afford debaters a sampling of the diverse questions and proposed solutions related to the 1983-1984 high school debate competition. Suggestions for additional sources of information are provided in the research guide. The Superintendent of Documents of the Government Printing Office has also provided a list of pertinent publications available for purchase.

In using this manual and exploring other sources, the debaters should keep in mind the current jurisdictional separation between State and Federal court systems. The distinction between civil and criminal proceedings should also be noted. Civil suits are actions between opposing parties seeking vindication of their respective individual or corporate rights. In a criminal action, the government seeks to protect the public by prosecuting an individual accused of violating a statutory prohibition against some specific act or omission. Should a criminal defendant be convicted, a criminal penalty such as a fine or a term of imprisonment may be imposed.

The items listed in the bibliography may be located at a nearby public, research, or depository library. United States Government documents listed in the bibliography may be found in most United States Government depository libraries. Your local public library should be able to assist you in locating those most convenient to you. The Library of Congress or Congressional Research Service cannot distribute copies of these or other materials to debaters.

GENERAL BACKGROUND STATEMENTS, REPORTS, AND ARTICLES

98th Congress, 1st Session - - - - - - - House Document No. 98-32

COMPREHENSIVE CRIME CONTROL ACT OF 1983

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A PROPOSAL FOR LEGISLATION ENTITLED THE "COMPREHENSIVE CRIME CONTROL ACT OF 1983"

MARCH 16, 1983.—Message and accompanying papers referred jointly to the Committees on the Judiciary, Energy and Commerce, and Government Operations and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
11-011 O WASHINGTON : 1983

To the Congress of the United States:

I am transmitting to the Congress today a legislative proposal entitled, the "Comprehensive Crime Control Act of 1983."

As you know, my Administration has made major efforts to fight crime in America. Soon after taking office, I directed the Attorney General and other Federal law enforcement officials to improve the efficiency and coordination of Federal law enforcement, with special emphasis on violent and drug-related crime. This has been accomplished largely through the work of the Cabinet Council on Legal Policy, chaired by the Attorney General, as well as through leadership provided by the White House Office on Drug Abuse Policy. As a result of these efforts, Federal law enforcement is better coordinated than ever before.

Of even greater importance, this Administration is attacking crime at its source by providing increased resources to Federal law enforcement agencies for apprehension, conviction, and incarceration. Last October, for example, I announced a national strategy to cripple organized crime and put drug traffickers out of business. We established twelve interagency task forces in key areas of the country—modeled in part on the Task Force that has been operating very successfully in South Florida—to work with State and local law enforcement officials to shut down organized criminal enterprises. We established a National Center for State and Local Law Enforcement Training to assist and train State and local officials in combatting syndicated crime. We also have taken many other actions, including use of the FBI in drug cases, to bring the full resources of the United States Government to bear on the critical problem of crime.

Our efforts are beginning to bear fruit. During 1982, for example, Federal cocaine seizures totalled nearly 12,500 pounds—nearly three times the amount seized in 1981. Heroin seizures almost doubled, and seizures of marijuana increased by 50 percent. I have every reason to believe that these and other administrative actions will continue to increase arrests and convictions of persons who violate Federal law.

But administrative action, however successful, is not enough. If the forces of law are to regain the upper hand over the forces of crime, ensuring that criminals are convicted and put and kept behind bars, basic legislative changes are needed.

During the 97th Congress, the Senate passed S. 2572, the Violent Crime and Drug Enforcement Improvements Act. Among its principal provisions, this legislation would have made major and urgently needed changes in our laws concerning bail, criminal forfeiture, and sentencing. It is unfortunate that S. 2572 was not enacted during the last Congress, but I look forward to working with the 98th Congress to secure, at long last, passage of critically needed substantive criminal law reform.

The legislative proposal that I am transmitting today provides a thorough and comprehensive reform of those aspects of Federal criminal law that have proven to be the largest obstacles in our fight against crime. Many of our proposals were considered by the 97th Congress. Others are new. Each is important in rolling back the tide of criminal activity that threatens our Nation, our families and our way of life.

Our proposal is summarized in some detail in the materials accompanying this message. I do, however, want to highlight six especially critical reforms:

- *Bail.* Our bill would make it much more difficult for a defendant likely to be a threat to his community to be released on bail pending trial.
- *Sentencing.* The bill would change the sentencing system to ensure that sentences would be determinate and consistent throughout the Federal system, with no parole possible.
- *Exclusionary rule.* Under our proposal, evidence in a criminal case that may have been improperly seized, which is now excluded from evidence, would be admissible upon a showing that the officer making the seizure acted in reasonable good faith.
- *Criminal forfeitures.* Our bill would strengthen the ability of Federal prosecutors to confiscate the assets and profits of criminal enterprises.
- *Insanity defense.* The bill would replace the current Federal insanity defense with a narrower defense applicable only to a person who is unable to appreciate the nature or wrongfulness of his acts.
- *Narcotics enforcement.* Our proposal would substantially increase the penalties for trafficking in drugs and would strengthen the regulatory authority of the Drug Enforcement Administration with respect to the diversion of legitimate drugs into illegal channels.

The bill contains many other important provisions, as well, concerning labor racketeering, capital punishment, consumer product tampering, and extradition, to name only a few. These proposals, taken together, will provide Federal law enforcement officials with important new tools with which to combat crime and will help once again to make our streets safe for all our citizens.

We must not allow further delay in protecting the rights, safety, and quality of life of all Americans. We must act now. Accordingly, I urge prompt consideration and passage of these legislative proposals.

RONALD REAGAN.

THE WHITE HOUSE, *March 16, 1983.*

1982
YEAR-END REPORT ON THE JUDICIARY

BY WARREN E. BURGER

CHIEF JUSTICE OF THE UNITED STATES

18-837 O - 83 - 2

INTRODUCTION

George Washington once referred to the due administration of justice as, "the strongest cement," "the firmest pillar," and "the cornerstone of good government . . . essential to the happiness of our country, and to the stability of our political system."

Unhappily, although we have made many improvements in the administration of justice, I regret to state that the "unfinished business"—the accumulated and deferred maintenance—outweighs the progress. It is crucial that we look ahead to see how we can accelerate needed changes. This Year-End Report highlights some of the 1982 developments in judicial administration.

1982: LEGISLATIVE DEVELOPMENTS AND OPPORTUNITIES

In 1982 Congress, with the support of the Executive Branch, made several attempts to alleviate some of the caseload burdens of the federal courts, but more pressing immediate non-judicial problems tend to get priority. As a result, needed changes come in slow and piecemeal fashion. The year 1982 has been no exception.

The need for a national appellate court to handle technical areas of law and to reduce both intercircuit conflicts and increasing appellate workloads prompted Congress to take one small step—the "Federal Court Improvement Act of 1982." That Act merged the U. S. Court of Claims and the U. S. Court of Customs and Patent Appeals into the 12-judge U. S. Court of Appeals for the Federal Circuit. That Court has newly exclusive jurisdiction over patent appeals from District Courts and appeals from the Merit System Protection Board and Boards of Contract Appeals. It also has the traditional exclusive jurisdiction of the merged courts in international trade, substantial claims against the U. S. Government and appeals from the Patent and Trademark Office either directly or through the District Courts. Among the other benefits referred to above, this will discourage "judge shopping" in important areas that call for specialized experience. The U. S. Claims Court, simultaneously created, takes over the trial jurisdiction of its predecessor the Court of Claims.[1] Chief Judge Howard Markey of the new Federal Circuit Court has estimated that the merger of the two courts can save taxpayers up to $1 million annually. Debate and consideration of the need for specialized courts is a sign of the increasing complexity of solving the problem of expanding federal court caseloads.

Other provisions of the Act—unrelated to the creation of the new courts—achieve "housekeeping" changes in the federal courts. For example, the Act imposes a more realistic basis for calculating the interest earned on money judgments while the trial court decision is under appeal. Rather than allow interest at the rate set by state law, post-judgment interest is now calculated based on U. S. Treasury bill rates. This provision, in the minds of many judges, will reduce the incentive for litigants to take appeals and enjoy the use of money at low interest rates pending the appellate disposition.

The Act also places a seven-year limit on the tenure of chief judges and bars judges over 64 years of age from becoming chief judge of a district or circuit court. The goal is to prevent a rapid succession of leadership in the federal courts—and at the same time to avoid the situation of an individual serving one or even two decades.

The dangers of casually resorting to creation of specialized courts are well illustrated by several Congressional responses to the *Northern Pipeline Construction Company* v. *Marathon Pipeline, Co.* decision earlier this year.[2] Proposed legislation to create independent Article III courts in ninety-five judicial districts for resolving cases arising under the bankruptcy laws demands very serious scrutiny. The impact of adding a new nationwide trial court in the federal judicial structure would create a management monster at a vast and unjustifiable additional cost to taxpayers. In this instance, creating specialized Article III courts is a remedy worse than the "disease."

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[1] The new U. S. Claims Court shares with the federal district court concurrent jurisdiction to provide equitable relief and is also authorized to render final—albeit appealable—decisions.

[2] See BURGER, CHIEF JUSTICE dissenting, *Northern Pipeline Construction Company* v. *Marathon Pipeline, Co.* case.

SUPREME COURT NEEDS

Legislation dealing with the Supreme Court's workload has been introduced again this year. The idea of a National Court of Appeals, for example, has been studied beginning with the 1972 Freund Report and the subsequent 1975 Hruska Commission Report. In two bills introduced this year, an intermediate court would have jurisdiction over cases referred to it by the Supreme Court and would be able to deny review "unless directed by the Supreme Court to decide the case." Without endorsing the specific remedies proposed, I have for more than ten years emphasized the need for some change if the Supreme Court is to keep up with its work and maintain appropriate quality.[3]

Pending before the 97th Congress when it adjourned were several other bills that would specifically affect the U. S. Supreme Court. Passed by the House and awaiting action in the Senate was a bill eliminating the statutory mandatory jurisdiction of the U. S. Supreme Court so as to give it virtually total discretion in selecting cases for review. Another provision of this bill would allow federal courts to determine which civil actions merit expedited handling.

Versions of bills eliminating mandatory jurisdiction of the U. S. Supreme Court have passed one or the other house in the past three Congresses. This legislation is supported by all nine Justices of the Supreme Court and there is no opposition from any source—yet it has not been enacted.

CRIMINAL JUSTICE

The Pretrial Services Act which passed Congress this year is an example of legislation which copies on a national scale what began as a pilot program in ten representative judicial districts. Pretrial Service Agencies administered by the Probation Division of the Administrative Office of the United States Courts were designed to achieve three basic goals: (1) reducing the costs associated with pretrial confinement; (2) reducing the rates of non-appearances; and (3) reducing the rates of arrests pending trial.

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[3] See page 12.

FUTURE DEVELOPMENTS IN THE JUDICIARY

There is a need to look beyond our immediate problems and on to 1983–1999. A bill to establish a commission to make a comprehensive study of the state and federal courts passed the Senate in 1982, and was awaiting action in the House when the 97th Congress adjourned. The proposed commission's major purposes are to study the jurisdiction of federal and state courts, appraise the problems currently confronting those courts, and to develop a long-range plan for their future needs. The bipartisan commission would consist of 14 members appointed by the heads of the three branches of government. The commission would submit annual and periodic reports on the state of the judiciary, and a final report at the end of ten years. This is essentially a step I proposed 12 years ago.

STATE-FEDERAL RELATIONS

The success of the American experiment in government we began 200 years ago rests heavily on the coordination of the work of state and federal courts. Two-way exchanges between state and federal courts of ideas about court management, procedures, reforms and administration have been encouraged. I maintain regular contacts with the Conference of Chief Justices, the National Center for State Courts, the National Judicial College and the Institute for Court Management, and there is a spirit of active cooperation between the state and federal court systems.

With no conscious thought or plan—indeed quite the contrary—there are signs that state and federal dockets are becoming more and more alike and that the federal system seems to be on its way to a *de facto* merger with the state court system. Neither the state nor federal judges favor this, for there are risks that this trend will undermine accepted principles of federalism.[4] As Chairman of the Judicial Conference of the United States, I requested and received authority to create a Subcommittee on Federal-State Relations composed of federal and state judges. The new Federal-State Subcommittee, chaired by Judge Mary Anne Richey[5] (District of Arizona), in addition to serving state and federal judiciaries, will identify basic problems concerning allocation of jurisdiction between the state and federal courts.

STATE JUSTICE INSTITUTE

State courts handle an overwhelming proportion of all judicial business. It is important, therefore, to ensure public confidence in the state courts. Legislative proposals to create a State Justice Institute are a highly appropriate way to assist state courts and simultaneously fortify the doctrine of federalism. The Senate has already passed a bill that would establish that institution as a non-profit corporation designed to administer federally funded assistance programs to state court systems.

DIVERSITY JURISDICTION

Both the federal and state systems will be strengthened if diversity jurisdiction cases go to state courts, since under the present system the federal court is obliged to apply state law. State judges are the best source to apply state law. The American Law Institute Study Report of 1969 concluded that "diversity jurisdiction extended federal jurisdiction to substantial classes of cases *with no valid justification for being in the national courts*." I have pressed this without result up to now.

Attorney General William French Smith stated earlier this year that "the elimination of diversity jurisdiction is a proposal whose time has finally arrived." Administrative Office figures show that abolition of diversity jurisdiction would result in up to a 25 percent reduction in the federal district courts' caseload and a 17 percent decrease in appellate filings. Diversity jurisdiction cases consume an inordinate amount of judicial resources. They represented 39 percent of all the cases that went to trial in the District Courts and 60 percent of all civil jury trials between June 30, 1981 and June 30, 1982. Ridding the federal courts of diversity jurisdiction would also curb unnecessary procedural litigation that arises in such cases. Moreover, it is fairly estimated that the cost of diversity cases in terms of juror expenses and judicial salaries amounted to $8.8 million in 1981.

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[4] On June 10, 1980 I urged the American Law Institute to consider the changes occurring in the state and federal judicial branches.

[5] Judge Richey is the first woman to chair a Judicial Conference Committee.

The traditional justification for diversity jurisdiction—the 18th century fear of local bias against out-of-state litigants—is today secondary to other factors such as geographical location of the court and court caseload.

Speaking through the Conference of [State] Chief Justices in August 1977, state judges agreed with the proposal to abolish federal diversity of citizenship jurisdiction, and voiced their willingness "to assume all or part of the diversity jurisdiction presently exercised by the federal courts." National Center for State Courts statistics show that civil filings in state courts would only increase by 1.03 percent on the average, if federal diversity jurisdiction were abolished. Approximately *seven thousand* state judges of general jurisdiction could—without undue burden—take over diversity jurisdiction cases now handled by about 500 U. S. District Judges.

There have been numerous Congressional attempts to deal with diversity jurisdiction. A bill calling for the elimination of diversity jurisdiction was pending at the adjournment of the 97th Congress. It should be promptly reintroduced in the 98th Congress and passed without more delay.

CORRECTIONS

The total prisoner population has doubled from about 200,000 in 1972 to approximately 400,000 in 1982. Mandatory sentencing bills adopted by 37 states and 123 new anticrime bills may well enlarge the prisoner population and lead to more prison explosions. In 1982, 39 states were under court order to reduce prison crowding and in 37 states there was litigation over prison conditions in 1981. Only extreme conditions warrant judicial intervention in this area, but some conditions are extreme.

There are several approaches for coping with these staggering numbers of prisoners. First, much can be done to improve the conditions of prisons and decrease the overcrowding by building new and renovating old facilities. Second, the prison confinement experience can be made more humane and effective by enhancing the caliber and training of prison officials. Third, prison programs which provide education and opportunities for work experience can be instituted.

The National Academy of Corrections which I advocated since 1971 was created recently to provide better trained guards and middle level personnel working with prisoners.[6] In its short life since its establishment in October 1981 as part of the National Institute of Corrections, the Academy trained over 2,100 persons, mostly state and local corrections officials, and expects an enrollment of 2,500 in 1983. In addition to the two primary areas of correctional management and staff training, the Academy will offer in 1983 a variety of new courses on prison and jail overcrowding and population management. Evaluations reveal that the courses are of high quality and rated favorably. Attorney General Smith deserves high praise for this step forward, as does Allen Breed, Director of the National Institute of Corrections.

One of the grave weaknesses of our prisons has been the lack of training of guards and attendants who have hourly eyeball-to-eyeball contact with prisoners. If they are not able to cope with inmates—who by definition are abnormal people—prison disturbances, costly riots and often loss of life will result.

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[6] See speech urging this: Remarks of CHIEF JUSTICE WARREN E. BURGER, National Conference on Corrections, Williamsburg, Virginia, December 7, 1971.

I am bound to repeat what I have pressed for many years: THAT EVERY CORRECTIONAL INSTITUTION MUST BE MADE A COMBINED EDUCATIONAL AND PRODUCTION INSTITUTION—A SCHOOL AND FACTORY WITH FENCES. ARCHAIC ATTITUDES AND OBSOLETE STATUTES LIMITING THE SALE AND TRANSPORTATION OF PRISON-MADE GOODS MUST BE CHANGED or we will continue the melancholy business of releasing inmates less fit to resume private life than before conviction. Not all, but many prison inmates can be motivated by training and by being active in productive work to help pay for the costs of incarceration. The "prison-production" programs[7] must be greatly expanded and made a universal practice as in the enlightened programs of northern European countries.

Correctional policy, particularly during times of rapidly increasing prisoner populations and prison overcrowding, can no longer remain confined to one level of government or one segment of society. State, local and federal authorities must focus on these problems and in concert—within the framework of federalism—develop a national correctional policy to deal with them. Very soon I will propose that Congress create a National Commission on Corrections Practices to review these matters and propose remedial programs.

THE "LITIGATION EXPLOSION"

It is becoming trite to say Americans tend to be the most litigious people on the globe, using the courts for airing all manner of grievances, disputes and perceived "entitlements." The escalating demands imposed on the courts have led to their becoming congested, slow, and costly. Fortunately, there has been a steady but all too limited increase in the number and variety of alternative dispute resolution programs, largely stimulated by the American Bar Association following the Pound Conference of 1976.[6] This reflects the view that courts are not the appropriate forums for the resolution of many problems, regardless of the condition of their dockets.

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[7] Control-Data Corporation trains inmates of the Minnesota State Penitentiary to assemble computers. The inmates can then secure employment in this rapidly expanding field when they are released. "Prison-production programs" have also been introduced in other states, including Kansas and Utah.

PRIVATE INITIATIVES

Funding for dispute resolution programs has been, to a large extent, transferred from the public to the private sector. The 1982 Dispute Resolution Program Directory compiled by the ABA, following the Pound Conference recommendations, is expected to list 188 communities in 38 states with dispute resolution centers of some sort created since 1970. The ABA is involved in setting up Multi-Door Dispute Resolution Centers, the major goal of which is the establishment of centralized, coordinated, dispute resolution organizations. These organizations would assist dispute resolution centers in acquiring appropriate case referrals and make citizens aware of the different forums available to them.

The National Institute for Dispute Resolution also aims toward a coherent and integrated approach to alternative dispute resolution and joins the ranks of other national organizations in financially supporting alternative dispute resolution research and programs.

ARBITRATION

A recent study by Rand Corporation indicates that the average cost to taxpayers of a jury trial, in all federal courts and a major state jurisdiction surveyed, is roughly $8,000 per case, taking into account only the direct operating costs.

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[6] The need for dispute resolution services is great and state governments and private institutions are only slowly coming forward to fill it. According to a June, 1982 ABA report on "State Legislation on Dispute Resolution," several state legislatures have made some progress in providing financial assistance to privately initiated alternatives to dispute resolution. New York's comprehensive Dispute Resolution Act appropriates, for example, funds for dispute resolution centers over a three year period.

The Rand study also suggests that the amount of the recovery in about 75 percent of civil trials examined in one typical major urban jurisdiction was less than $8,000. Furthermore, the Rand researchers believe that the costs to the two contending parties substantially exceed $8,000. If this is even approximately correct—and I suspect it is—there must be a better way.

The alternative dispute resolution movement, which encompasses a wide range of approaches and procedures for handling different types of conflicts, represents a better way. Arbitration is one of the oldest forms of alternatives to dispute resolution.

The Civil Justice Institute of the Rand Corporation is currently conducting an evaluation of the Pittsburgh, Pennsylvania, court-annexed arbitration program. The arbitration program in Pittsburgh, like the one in Philadelphia, dates back to the 1950's. The Pittsburgh study focuses on the litigant's and attorney's satisfaction with the voluntary arbitration program.

LEGAL EDUCATION AND TRAINING

Legal education encompasses more than traditional courses dealing with case law. For a dozen years, I have pressed on the ABA and law schools that future generations of the legal profession must be as well versed in negotiation, mediation, and arbitration as in the conventional adversary method. Legal education should prepare students to become not only advocates, but competent problem-solvers and counselors without resorting to litigation. Happily, law schools and the Bar have responded to meet these needs, despite the problems of uncertain funding and pointless "turf-inspired" disagreement over faculty status of those teaching clinical legal education. By 1982, 95 percent of ABA-approved law schools offered some kind of practical professional skills training to their students—a large expansion over past practices. For example, the University of Pennsylvania's clinical program operating in conjunction with the Wharton

School's Small Business Development Center emphasizes "dispute-avoidance" skills.[9]

In addition to clinical education and trial advocacy programs available in law schools, law students and practitioners can participate in numerous continuing education programs and a new phenomenon of the 1980's, the American Inns of Court—known as AMINNCOURT. The Inns of Court Program, inspired by the English experience, responds to the need for advocate training at the law school level. THE ENCOURAGING FACTOR IS THAT THERE HAVE BEEN MORE CHANGES IN LEGAL EDUCATION IN THESE RESPECTS IN THE LAST 10 YEARS THAN IN THE PREVIOUS 50 YEARS.

Changing Techniques of Lawyers

The Institute for Court Management and the ABA Action Commission have collaborated on projects in Colorado, New Mexico, and New Jersey where telephone conference calls are used in pre-trial issues involving civil and criminal cases. Findings of the Commission revealed that seventy-seven percent of the participating lawyers charged their clients lower amounts for conferences by telephone than for in-court hearings. Lawyers who handled motions by telephone reported that they charged less than half the amount per hearing than that charged by lawyers who appeared in person.

THE JUDICIARY

Judicial Workload and Productivity

The upward trend of case filings in the federal courts continued in 1982. There were 238,875 new filings in the federal district courts representing a 12 percent increase over 1981. The civil docket rose by 14 percent and the criminal caseload grew by 4.5 percent. Although the rate of terminations has increased, the percentage of cases pending has likewise expanded. The workload of the Courts of Appeal increased by six percent over 1981.

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[9] Other law schools with noteworthy programs include Harvard, City University of New York, Illinois Institute of Technology-Chicago Kent, University of Michigan, University of Wisconsin, and Mitchell College of Law.

The excessive caseload burden of the federal courts is nowhere more evident than in the Supreme Court. In 1981, 350 more cases were filed with the Supreme Court than in the previous year. For the first time since the Court was granted relief by the Certiorari legislation of 1925, the calendar for the Court's current Term was substantially filled (with only 4 remaining weeks open to schedule oral arguments) prior to the beginning of the Term in October.

All federal judges are responding to their increasing workload with increases in productivity. At the District Court level, there were 463 filings for each of the 515 authorized judgeships in 1982. Although the number of terminations has increased from 403 in 1981 to 430, cases pending per judgeship have increased at even a greater pace from 396 to 431, reflecting a 9 percent growth rate over the last year.

This year proved to be record setting in the Courts of Appeal with filings exceeding for the first time 600 cases per authorized three-judge panel. The number of terminated cases increased by 22 cases per judgeship or 12 percent over 1981. In 24 to 48 months this increase will be reflected in Supreme Court filings.

New judgeships are desperately needed to cope with the ever-increasing caseload[10]. The Judicial Conference, in 1981, requested 75 new federal judges (51 District and 24 Courts of Appeal) and the need is even greater at the end of 1982. This request for additional judges was not acted on by Congress in 1982.

ADMINISTRATION AND MANAGEMENT—NEW COURT ADMINISTRATORS AUTHORIZED

Second only to the burgeoning caseload are administrative and management demands placed on judges and the few court administrators provided in the federal courts.

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[10] This is an added reason why Congress should not create more than 200 Article III judgeships *for* bankruptcy cases. It's more district judges we need.

In 1971, for the first time in the history of the federal court system, court administrators were introduced as aides to the chief judges of the circuits. We had requested court administrators for each of the 11 circuits and for the larger metropolitan district courts. However, Congress authorized court administrators designated as Circuit Executives only for each of the 11 circuits. None were authorized for the District Courts. Two years ago Congress authorized on a temporary and pilot basis, court administrators designated as District Executives for five of the larger district courts. That program is progressing well. In this area the states have been far ahead of the federal system and the advent of the Institute for Court Management in 1969 provided a source of trained court administrators for all courts.

JUDICIAL SURVIVORS ANNUITIES

Federal Judicial Survivors' Annuities are inadequate in comparison to both private practice and the state court systems. This factor and inflation have direct bearing on the wave of resignations from the federal bench over the past few decades. There were seven resignations in the 1950s; eight in the 1960s; twenty-four in the 1970s; and already ten during the first two years of the 1980s including three federal judges who resigned in 1982 to return to more lucrative private endeavors. THIS IS MORE RESIGNATIONS THAN FROM 1790 to 1950. The average age of those resigning is 56, thus depriving the federal bench of 15 to 20 of the most productive years of the incumbent's tenure.

The present inadequate annuities scheme presents grave problems bearing on the caliber of those who will accept appointments to the federal bench. We cannot tolerate a system in which the federal court will be staffed disproportionately either by those of independent means or those who "could not make it" in private practice. Adequate compensation and benefits for survivors are needed to assure the independence of the judiciary and to encourage well-qualified individuals to accept appointments to the federal bench.

CONCLUSION

September 17, 1987 will mark the 200th anniversary of the Convention of the Constitution of the United States of America. The commemoration of the Constitution should not, however, be confined to a fixed date or event but should extend over several years of observance.

A bill establishing a Commission on the Bicentennial of the Constitution was passed by the Senate in 1982. It would create a 16 member Commission appointed by the heads of the three branches of government to foster and coordinate activities that commemorate the Bicentennial of the Constitution until December 31, 1989. In performing its duties, the Commission would cooperate with government and private agencies, academic institutions and civic and professional associations.

The Bicentennial celebration takes into account several important dates beyond the ratification of the Constitution that are worthy of mention. For example, it was not until 1789 that the first Congress was officially organized; the first President, George Washington, was inaugurated; the first Judicial Act was passed; the first Chief Justice, John Jay, was confirmed; and most significant, the Bill of Rights was submitted and ratified first by New Jersey.

This legacy has provided the impetus for many innovations and reforms in judicial administration during the last 200 years. This year's developments in the administration of justice continue in this tradition. Despite some progress, however, many new problems have arisen and the "deferred maintenance" grows.

ANNUAL REPORT ON THE STATE OF THE JUDICIARY

Remarks of

WARREN E. BURGER

CHIEF JUSTICE OF THE UNITED STATES

at the Midyear Meeting

American Bar Association

New Orleans, Louisiana

February 6, 1983

18-837 O - 83 - 3

THE NEED FOR "TIME AND FRESHNESS OF MIND . . . AND REFLECTION . . . INDISPENSABLE TO THOUGHTFUL, UNHURRIED DECISION."

For the 14th year you provide me the opportunity to lay before you, the leaders of our profession, problems facing the courts. On prior occasions I have often presented a series of problems, my observations on each, and a request for your advice and support.

Today I will focus on only one subject which is perhaps the most important single, immediate problem facing the Judiciary and that is the caseload of the Supreme Court and the need for the "time and [the] freshness of mind . . . and reflection . . . indispensable to thoughtful, unhurried decision."

I am well aware that having raised my voice on many occasions during the past 14 years concerning the overburdening of the courts and of the Supreme Court, there is the risk that anyone takes in repeatedly "crying wolf." But I suggest the analogy of the early pioneer who, looking out the window of his log cabin, saw a pack of wolves destroying his livestock, killing his chickens and clawing at his smokehouse with its supply of food. Someone in that situation need not be apologetic about calling for help—if there is anyone within hearing who can help—as you who are within hearing can help.

Beginning when I first appeared as an advocate in the Supreme Court and later, during 13 years on the United States Court of Appeals, I observed the Supreme Court's work at close range and I reached the conclusion that there were some serious problems down the road. When I took my present office in 1969 I was well aware that in 1953, the first year of the tenure of my distinguished predecessor Chief Justice Warren, the Court had 1,463 cases on its docket and had issued 65 signed Court opinions.[1] In the Term that ended last July the Supreme Court had 5,311 cases on its docket, and issued 141 signed Court opinions, an increase of approximately 270% in the docket and more than double the number of signed opinions.[2] The best single measurement of the Court's work is its signed Court opinions.[3] We see therefore that during my tenure in office the steady increase of preceding decades has become almost a tidal wave. Occasionally filings reach a plateau but do not remain on a plateau for long. Part, but not all of the explanation for the increase in cases is that in just the short span of 14 years, Congress has enacted more than 100 statutes creating new claims, entitlements and causes of action. Judicial opinions have also created new causes of action but to a lesser extent.

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[1] This figure does not include concurring or dissenting opinions, or Chambers opinions granting or denying stays of judgments or other extraordinary relief.

In this period another development has become acute. Gradually over the last 30 years or more the content and complexity of the cases have changed drastically and often there are few precedents to guide the courts in these new areas. These wholly new kinds of cases that are reaching the courts reflect changes in our increasingly complex society and changes in the relationships of government to individuals.

Increasingly the Court has been confronted with more and more claims of prisoners relating to the condition of their confinement; some are absurd and frivolous, some are valid. There are new claims of teachers and professors relating to their tenure and the conditions of their employment, and new claims of employment discrimination. There are challenges to the validity of new kinds of taxes levied by the hard-pressed states, giving rise to difficult constitutional questions. There are difficult and complex cases arising out of long overdue recognition of the rights of women and of minorities. New legal problems arise from the growth of multinational corporations, and cases on conflicts between protection of the environment and development of new sources of energy and new industry. These are but a few examples.

This is not surprising for we live in a dynamic society. As a people we have never been content with the status quo. We have recognized the impact of all this on the lower courts by more than doubling the number of judges in 30 years. In 1953 there were 279 authorized federal judgeships; today there are 647 and these are the judges who produce the grist for the Supreme Court "mill." In 1953 District Court filings were about 99,000; there were about 3,200 Court of Appeals filings. Currently there are nearly 240,000 District Court filings and 28,000 Court of Appeals filings—increasing from 99,000 to one quarter million in the district court and from 3,200 to 28,000 in the court of appeals.

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[2] *Ibid.*

[3] In the Term ending July 1982 the U. S. Law Week reported a total of 141 signed Court opinions and 10 Per Curiam opinions.

If we project the experience of the past 14 years over the next 14 years, the Supreme Court may well have 7,000 to 9,000 filings annually. I leave it to you to say how many fully argued cases requiring full treatment and signed opinions that would reasonably call for. Does anyone think nine Justices could cope with 9,000 filings?

Recently I took off the shelves the volumes of the U. S. Reports for the 1882 Term. I will anticipate the critics of what I say today, by acknowledging that the Court's 1882 Reports show 260 opinions. We know of course, neither cases nor opinions are fungible. On the first page of Volume 106 of the 1882 Term, we find that what is indexed as an "opinion" is simply an explanation of why the Court denied a petition for rehearing. Today we dispose of such petitions with one line on the Monday Order List. No opinion is needed. An analysis of all the opinions in the 1882 Term reveals that out of the 260 opinions indexed as such, more than one half ranged from one to four pages. A majority of those cases could fairly be described as "landlord and tenant" type cases, cases important to the individual litigants, but of no lasting general importance to federal law.

If the Court had been authorized to exercise discretionary certiorari jurisdiction in 1882, probably half of what were described in 1882 as "cases" probably would have been denials of certiorari. The 1925 certiorari amendment which Chief Justice Taft persuaded Congress to adopt enlarged the Court's discretion to grant or deny review, but that discretion has gradually been eroded. In the most recent Term of the Court 25% of the argued cases were mandatory appeals and more than 50% of all those disposed of on the merits were mandatory appeals.

It is of no little significance that the final opinion of the 1882 Term is dated May 7. So from May 7 to October 8, when the 1883 Term opened, there were no stacks of about 90 to 100 new filings handed or mailed to each Justice each week as is the case today.

When I arrived at the Supreme Court in 1969, after observing these developments at close range for more than 15 years, I concluded that something needed to be done. The first step necessary was a comprehensive study of the Court's workload, its practices and its jurisdiction. Fortunately we had the advantage of the monumental study of the American Law Institute of 1969 recommending significant changes in federal jurisdiction.

Even if all these recommendations had been followed that would not have solved the caseload problems of the Supreme Court. All of them should have long since been adopted but it is fortunate that Congress responded to our urgings and substantially narrowed the jurisdiction of three judge District Courts with the mandatory right of appeal to the Supreme Court.

Against this background I appointed a committee of distinguished lawyers in 1971 to study the Supreme Court's problems, and prevailed upon Professor Paul Freund, one of America's foremost legal scholars, experienced in Supreme Court work, to chair that committee. The members of this committee included other lawyers with long experience in the Supreme Court.[4] In the face of the stark figures I have mentioned, that is the changes in the number and kinds of cases from 1953 to 1969, I would have been derelict in my duty had I not taken the step of creating the Freund Committee.

At that time, I also urged the Congress to create a commission, with representatives of each of the three branches of the government, to study the growth of the work of all of the federal courts including the Supreme Court. Congress responded and created the Commission chaired by Senator Roman Hruska of Nebraska.[5] That body's 1974 report and recommendations with respect to the Supreme Court were generally similar to those made by the Freund Committee in 1972. The central piece in each report was that an intermediate appellate court of some kind should be created to give relief to the Supreme Court. It is against this background that I wish to discuss with you today the very grave problem of the Supreme Court, now more acute than in 1953 or 1969.

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[4] Professor Paul Freund, Professor Alexander M. Bickel, Peter D. Ehrenhaft, Dean Russell D. Niles, Bernard G. Segal, Robert L. Stern, and Professor Charles Alan Wright.

I assure you at the outset that if I knew precisely how to solve this problem I would not hesitate to say so, but I do not have the answers. When the Freund Report was made in 1972 followed by the Hruska Report, some lawyers and members of the judiciary were quite startled. In 1974 and again in 1976, the House of Delegates of this Association had the foresight to conclude there was an urgent need for such an intermediate appellate court. That need is far more urgent today.

It is fair to say that in 1972 four or five members of the Supreme Court were in general agreement with the diagnosis of the problem made in those two important reports. However, when no consensus emerged as to the remedy, within the Supreme Court or within the legal profession, I concluded I had no choice but to await events, keep a watchful eye on the docket and from time to time draw the subject to your attention. I have done that. Today I do it again.

In a lecture at New York University last November commemorating the 30th Anniversary of the Institute of Judicial

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[5] Senator Roman L. Hruska, Judge J. Edward Lumbard, Senator Quentin N. Burdick, Senator Hiram L. Fong, Senator John L. McClellan, Honorable Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, Judge Alfred T. Sulmonetti, Congressman Jack Brooks, Congressman Walter Flowers, Congressman Edward Hutchinson, Congressman Charles E. Wiggins, Judge Roger Robb, Bernard G. Segal, Professor Herbert Wechsler.

Administration and paying tribute to the pioneer of all administrative innovators, Chief Justice Vanderbilt of New Jersey, I undertook to discuss with lawyers and judges how other countries deal with these problems. The highly civilized and industrialized countries from Sweden down to Italy draw their legal institutions primarily from the law of Rome and the Napoleonic Codes. In those countries as we know, judicial authority has not achieved the status that it has under our Constitution. In only a few countries of the world do courts exercise the authority to declare an act of the legislative branch or the executive unconstitutional.

In France, for example, a nine member Constitutional Council has exclusive authority to deal with constitutional questions. Other French courts of last resort deal with decisions of administrative agencies, and civil or criminal cases. In England, from whence our law and judicial institutions derive, we find a similar division. We remember of course that England's structure of government does not contain the sharp separation of executive, legislative and judicial authority that we have under our Constitution. In England the true tribunal of last resort is not a strictly judicial body in our constitutional sense, but rather it is the Parliament itself. The formal title of Parliament, as we recall from our law school days, is the "High Court of Parliament." Review by the Law Lords is only by leave. Until a few years ago two five member panels divided about 40 cases a year. Currently, except for about 50 to 70 cases a year reviewed by the Law Lords, final judgments are rendered by the two courts of appeal—one for civil and one for criminal cases. Each panel of the Law Lords annually hears 35 cases, more or less.

The Lord Chief Justice presides over the Court of Appeal for criminal cases and the Lord Master of the Rolls presides over the court dealing with all other appeals. This specialized division of jurisdiction should not startle us unduly because two of our own states, Texas and Oklahoma, have followed this pattern.

I do not suggest for a moment that we slavishly follow the models of England or other European countries. What I do suggest is that any intelligent analysis and consideration of our problems demands a close look at other systems by a tripartite commission which I, today, ask Congress to create.

The problems of all the other courts in our federal system can be met by a combination of improved procedures, wider use of court administrators, and ultimately, by the addition of more judges. And adding judges is what we have done. But in the Supreme Court more Justices would not help. As Chief Justice Hughes pointed out in 1937, more Justices would be a handicap, not a remedy.

Within the Court we can and we have changed a number of our procedures since 1969. For example we have reduced the oral argument from one hour to 30 minutes. We have increased the number of summary dispositions on the merits without hearing full oral arguments. I predict that if there is not prompt action to give relief there will be a large increase in summary dispositions, particularly in dealing with criminal cases when the lower courts have either misread or ignored our controlling holdings.

Given the conditions the Supreme Court faces we have gone about as far as we can go.

In 1958, when the Court issued only 99 signed Court opinions, Professor Henry Hart of Harvard in the Annual Review of the Supreme Court's work, concluded that:

> ". . . the number of cases which the Supreme Court tries to decide by full opinion, far from being increased, ought to be materially decreased."[6]

Professor Hart was saying that 99 full signed Court opinions were too many. In 1959 Justice Frankfurter echoed Professor Hart saying:

> "[T]he judgments of this Court . . . presuppose ample time and freshness of mind for [the] private study and reflection . . . [and] fruitful interchange . . . indispensable to thoughtful, unhurried decision. . . . It is

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[6] Henry J. Hart, Jr., "Foreword: The Time Chart of the Justices," 73 *Harvard Law Review*, 84, 99 (1959).

> therefore imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication."[7]

When Justice Frankfurter said that, there were 97 signed Court opinions.

From 27 years on the Bench almost equally divided between the Court of Appeals and the Supreme Court, I agree heartily with Professor Hart and Justice Frankfurter.

I repeat that the straightforward, relatively simple remedies applicable to the other courts do not provide answers for the Supreme Court. Only fundamental changes in structure and jurisdiction will provide a solution that will maintain the historic posture of the Supreme Court, will insure "proper time for reflection," preserve the traditional quality of decisions, and avoid a breakdown of the system—or of some of the Justices.

It will no longer do to say glibly, as some have, that we "do not need another tier of courts," or another court, or a change in the structure of appellate procedure at the highest level simply because we have functioned with the present structure of three tiers of courts since 1891. That is meaningless in terms of the needs of the present and particularly of the next 10 to 20 years and for the 21st Century. We can no longer tolerate the vacuous notion that we can get along with the present structure "because we have always done it that way."

Ninety-two years ago when Congress finally got around to creating the federal courts of appeals, that new structure was adequate for a period only a quarter of a century removed from the Civil War. By that time we had substituted steel pens for quill pens, the steam engine was here to stay and steam moved boats on the rivers and on the oceans and pulled trains on rails. Nine Justices were adequate to deal with 250 of the kinds of cases filed with the Court in those days. But transportation has moved from horses and steam to jet power, science and engineering has landed us on the moon, and satellites in outer space are a routine part of our communications systems, yet we are still expecting nine Justices to deal, not with 900 filings a year, as was true in 1933, but with 4,000 to 5,000—and who knows how many in the years ahead.

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[7] *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437, 458–459 (1959) (Frankfurter, J., dissenting).

These problems did not fall on us suddenly and if by default something approaching a disaster comes on us it will not come like a Pearl Harbor. Indeed it might be better if that were the case, because a sudden disaster galvanizes people, raises the adrenalin, sharpens the intellect, energizes them to meet the crisis.

The problems we now face have resulted from the growth of the country, changes in science and engineering, the increasing complexity of society, the increasing complexity of the structure of business and industry, the enlargement of rights of individuals, changes in the relationships of people to government, and underlying all this, the great and increasing litigiousness of our people who historically have a passion for "taking to the Law."

Individually we on the Court have "nibbled around the edges" of our dilemma for a dozen years without coming as near to the heart of the problem as either the Freund or the Hruska Reports. But I am happy to observe that in recent months all members of the Court who have spoken on the subject—now a clear majority of the Court—are essentially of one mind: that there is indeed a very grave problem and that something must be done.

I assure them—and you—that I warmly welcome this concern for what we know is an old problem. The Justices may not agree as to particulars, but all those who have spoken agree generally on the diagnosis of the illness. Now that the diagnosis has been made it is time to turn our attention to the remedies. I hope this will be done—and done very soon—by an independent Congressionally authorized body appointed by the three Branches of the Government.

I will be very candid and say to you that my purpose today is to provoke you and others and to stimulate a vigorous debate and discussion. For some time I have invited suggestions and recommendations as to a solution and I will now discuss several possible solutions without any idea that any one of them or any combination of them will meet the needs.

The first proposal that merits consideration of the study commission is one that is already familiar to us since it was the one recommended by both the Freund Committee and the Hruska Commission. It is that an intermediate court of appeals be created and that the Supreme Court be authorized to transfer to that court such cases as it elects to refer.[8] Since that has been debated and discussed I need say no more about it at this time.

Another proposal has been made by a distinguished State Supreme Court Justice—former Chief Justice of Arizona, Justice James Duke Cameron. He has proposed an intermediate National Court of State Appeals to review decisions of state courts on federal constitutional questions. That deserves study.

Still another alternative advanced would be to create not one but two intermediate courts of appeals, one for criminal cases and one for civil cases.

The need to seek solutions is so great in the minds of some knowledgeable people that an even more drastic proposal has been suggested. In response to my inquiries one lawyer with long experience in the Supreme Court has made a proposal which, even as I outline it to you, I am bound to say I would not advocate it. But because I disagree with it is not a reason to brush it aside. I hope it will provoke you. The suggestion is that nine additional Justices be authorized as a separate panel of the Supreme Court with jurisdiction of all but criminal and constitutional cases. Those cases would remain with the present Court. These two panels would be permanently separated as to functions. This would be a radical departure from our tradition and leaves me with grave reservations. Moreover this drastic remedy could well require a constitutional amendment.

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[8] *See also* Advisory Council for Appellate Justice's "Recommendation for Improving the Federal Intermediate Appellate System" (1974).

While all options are being studied I advocate an interim step which would provide immediate relief and also provide a concrete experience and information on which decisions can be made. I propose that, without waiting for any further study, a special, but temporary panel of the new United States Court of Appeals for the Federal Circuit be created. This special temporary panel, which I now propose, could be added to that court for administrative purposes. It should have special and narrow jurisdiction to decide all intercircuit conflicts, and a limited five year existence.

Legislation along these lines was introduced in the 97th Congress by Senators Thurmond, Heflin and by Congressman Kastenmeier. I recommend that Congress promptly authorize such a panel as it has authorized so many important temporary panels and courts in the past dozen years. In the past 20 years Congress has created special, temporary panels including one for the selection of a public prosecutor, the Temporary Emergency Court of Appeals, the Multi-District Litigation Panel and the United States Foreign Intelligence Surveillance Court. These courts share a common pattern: (a) they are temporary; (b) the members are designated from among the existing federal judges so that no new permanent court structure is created. More than 50 judges have been designated by the Chief Justice under authority granted by Congress.

This interim, temporary panel I suggest could be made up of two judges designated from each Circuit, creating a pool of 26 judges. Subject to further study, my suggestion would be that for periods of six months—or perhaps one year—a panel of seven or nine judges be drawn from the 26 judges in that pool. That panel would hear and decide all intercircuit conflicts and possibly, in addition, a defined category of statutory interpretation cases.

You may appropriately ask "What will this accomplish?" It could accomplish this: it could take as many as 35 to 50 cases a year from the argument calendar of the Supreme Court. The Supreme Court would retain certiorari jurisdiction over such cases. Here again you may properly ask

"How will this help if the decisions of that special panel may need to be heard by a fourth tier, that is the Supreme Court itself?" First we do not know whether they will in fact later be reviewed by the Supreme Court. I would have confidence that 26 experienced judges assigned in this manner would resolve the conflicts among the Circuits in such a way that the Supreme Court would not often grant further review. That has been the case with the Temporary Emergency Court of Appeals and the other special, temporary panels.

I have suggested this special panel be attached, for administrative purposes, to the Court of Appeals for the Federal Circuit partly because it has excellent court facilities in Washington.

If I am correct, this could reduce the Supreme Court calendar to some figure at or near the 100 argued cases and 100 signed opinions a year that Frankfurter, Hart and others suggested as the appropriate limit. While this special panel is functioning the Congressionally created commission could study its work. I emphasize that such a special panel should be authorized for a limited period not exceeding five years with a requirement that it report annually to the Congress, the President and the Judicial Conference of the United States. In that way the commission would be able to evaluate the over-all problem.

I repeat that if I were sure that this is the best solution I would not hesitate to advance it as a permanent remedy. I advance it only as a temporary, interim measure until it is tested or until some better long range solution can be devised. If Congress acts, as I hope it will, the commission will have a concrete example of the utility of this special temporary panel for review of intercircuit conflicts. The commission would therefore have the advantage of seeing whether such an intermediate reviewing court is workable rather than simply theorizing about it.

. . . . . .

Some years ago a German psychologist was engaged in exploring the comparative functioning of the minds of human beings and chimpanzees, the highest order of primates. He placed a chimpanzee in a cage with a small stick. Then he put some bananas, the favorite food of primates, outside the cage but beyond the reach of the chimpanzee. The chimpanzee tried to reach for the fruit, but could not touch it. He moaned and whimpered and complained—some might say as we judges complain about the litigious society and the overload of cases. Some time passed. Suddenly the chimpanzee seized the stick, reached out and pulled the bananas into the cage. The chimpanzee had found a solution.

The chimpanzee could see the bananas, and now we can see the problem. What we need is to find the stick. Finding that stick—the solution—is as much your responsibility as it is mine or that of the other Justices.

If this Association moves on this problem, its leadership will be crucial, as it was in creating the Institute for Court Management, the National Center for State Courts, the National Institute of Corrections and the seminal Pound Conference of 1976.

I therefore urge you to ask the Congress, without delay, to enact a statute in two parts: first to create a tripartite commission to pick up where the Freund and Hruska reports left off, and second, create the special temporary appellate panel to resolve circuit conflicts.

Department of Justice

REMARKS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

TO

THE OPENING SESSION OF THE 28TH ANNUAL SPRING MEETING

OF THE

AMERICAN COLLEGE OF TRIAL LAWYERS

10:00 A.M. EST
MONDAY, APRIL 5, 1982
BOCA RATON HOTEL
BOCA RATON, FLORIDA

In addressing this distinguished College of Trial Lawyers, I would like to discuss a problem that has been evident though unsolved for some years -- the explosive and continuing growth of litigation within the federal judicial system.

To quote Judge Learned Hand, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." As the amount of litigation has grown, so too has the sense of dread. The growth of litigation in the federal courts has made litigation an increasingly time-consuming and disillusioning experience for attorneys and litigants alike. The resulting burdens on the courts are gradually effecting a dramatic change in the character not only of our federal judicial system, but also of our profession and of society.

According to an old story, the great Chief Justice John Marshall once had some difficulty attempting to dislodge one particular law book from the high and tightly packed shelf where it rested. Trying to get that one book loose he succeeded instead in dislodging the entire row, which struck him on the head and knocked him to the floor. A librarian instantly ran to his rescue, but the venerable old Chief Justice was unhurt and answered the offer of assistance by saying:

> "Let me alone. I am a little stunned for
> the moment. That is all. I have laid
> down the law often, now this is the
> first time the law has laid me down."

Few federal judges today could make the same response. The dramatic increase in litigation in the federal courts has nearly laid low the federal judicial system itself.

A real acceleration in the incidence of litigation began in the 1960s. In the two-decade period between 1960 and 1981, the number of cases filed in the Supreme Court doubled. Even more dramatic and important, however, has been the growth of cases in the lower courts, which cannot control the size of their dockets. Annual civil filings in the federal district courts tripled between 1960 and 1981 -- from approximately 60,000 to over 180,000. During the same time, appeals increased more than six-fold -- from less than 4,000 annually to over 26,000. Between 1960 and 1981, the number of civil filings increased eight times faster than the population, and the number of appeals twenty-two times faster.

Most significantly, the number of cases per judge has increased dramatically. Despite the Omnibus Judges Bill of 1978, which added 152 judges to the federal bench, the growth of the federal judiciary has not kept pace with the litigation boom. At the district court level, judges today must process fifty percent more new filings each year than in 1960. Judges at the appeals level must hear almost four times as many cases today as in 1960. In addition, litigation is more complex and time-consuming than ever before. In 1960, for example, only thirty-five federal trials took more than one month. In 1981 there were five times that number.

It is unsurprising that expeditious resolutions of civil suits seldom occur. A recent survey found over 15,000 cases in our federal district courts that have been pending for more than three years.

What do all these statistics portend for our federal judicial system? Moreover, what are the effects of this mounting burden on the process of deciding cases and on the quality of justice available from our federal courts?

The probable effects were most clearly and forcefully articulated at the 1976 Pound Conference, which was a gathering of the most distinguished scholars of the judicial process to consider the present and future problems of the federal judiciary. As Robert Bork, former Solicitor General and now the newest member of the D.C. Circuit noted there:

> "The proliferation of social policies through statute and regulation creates a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judicial model to a bureaucratic model."

As Judge Bork stressed:

> "[W]e are thrusting a workload on the courts that forces them to an assembly line model. Assembly line justice cannot sustain those virtues for which we have always prized federal courts: scholarship, a generalist

> view of the law, wisdom, mature and dispassionate reflection, and -- especially important for the perceived legitimacy of judicial authority -- careful and reasoned explanation of their decisions."

I need not remind this audience that, as the workload has increased, the attention which each case receives from the court has declined. The incidence of decisions without written opinions increases. The availability of oral argument declines. Judges must rely increasingly on the work of an expanding cadre of law clerks, magistrates, and other court personnel.

Judge McGowan, a veteran of 19 years on the D.C. Circuit, noted recently that his participation in the decisional process has "changed markedly" since his early years on the bench. He added that it "is much less intellectually satisfying than formerly because there is too much paper shuffling and too little time for personal involvement in research and reflection." It is easy in these circumstances for lawyers, litigants, and the general public to despair of the legal process itself.

The first step in responding to these problems must be more judicial resources. In 1978, the Omnibus Judges Bill authorized the President to appoint 152 new federal judges. That act, however, represented the first increase in the size of the federal judiciary in eight years -- and only the second in the past two decades. Already there is an obvious immediate need for more federal judges to handle the burgeoning caseload.

The Administrative Office of the United States Courts recently transmitted to Congress a bill providing for 11 new permanent and 3 temporary circuit court judges along with 24 permanent and 6 temporary district court judges, for a total of 44 new federal judges. The bill is based on a careful assessment of need by the Judicial Conference. I believe that it is time to recognize that the creation of judgeships should be regularized and based upon such an assessment of need, not politics. There should therefore be bipartisan support for this bill.

The problem facing the federal courts, however, is not simply one of too few judges to handle the work. Too great an expansion of the federal judiciary would create its own set of problems. Constant dramatic expansion tends over time to dilute the prestige and reduce the collegiality of the federal bench, making it harder to attract the best candidates. Increasing the number of decision-makers issuing opinions would threaten uniformity, evenhandedness, and stability in the application of the law. There were already 25,000 decisions issued by the courts of appeal last year and over 200,000 decisions at the district court level. Doctrinal confusion even within a single jurisdiction has become increasingly difficult to avoid.
As former Assistant Attorney General Daniel Meador has noted, we risk creation of a "judicial Tower of Babel." Moreover, the utility of the *en banc* procedure to establish a clear law of the circuit is considerably reduced in courts this large. Professor

Meador noted, for example, that the en banc opinions produced by the twenty-six judges of the Fifth Circuit prior to its division:

> "suggest that it ceased to be the kind of appellate tribunal to which the Anglo-American legal system has become accustomed. Opinions were issued by clumps of judges as though they were members of a convention or a legislature."

By creating too large a number of additional judges in response to the litigation surge, we risk creating more doctrinal confusion which, in turn, would generate still more litigation.

Although the creation of still more judges must unavoidably be part of our answer to the growth of litigation, we must also address the basic underlying cause of this growth and attempt, in Judge Friendly's phrase, to "avert the flood by lessening the flow." The basic cause of the continued growth of filings is the progressive accumulation of new litigable rights and entitlements created by the Congress and by courts themselves.

For many years now, we have attempted, as a society, to regulate by law and judicial processes more and more aspects of society. As Chief Justice Burger stated in his 1982 Annual Report on the State of the Judiciary:

> "One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range

> of personal distresses and anxieties. Remedies for personal wrongs that were once considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.' The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity...."

It is the supreme irony that our use of courts to enforce so many newly created rights may actually erode their usefulness in protecting the most essential rights of our citizens. Forcing federal courts to do too big a job has jeopardized the effectiveness of the job they have historically performed.

The problem of federal judicial overload is, of course, in large measure caused by the Congress. Each Congress enacts more legislation that gives rise to new litigation. Though Chief Justice Burger has, since 1972, called on Congress to require a judicial impact statement for each piece of legislation affecting the courts, Congress has seldom given adequate attention to the judicial burdens imposed by new legislation. It is difficult to recall any statute in recent years that has eliminated any significant category of litigation. As the burden of government regulation has accumulated, the opportunities and incentives for litigation seem to have expanded geometrically.

In part, however, the judiciary has over the years brought this overload on itself. The judicial activism that has characterized the past two decades has invited far greater use of the courts to address society's ills. Through loose constructions of the "case or controversy" requirement and traditional doctrines of justiciability -- such as standing, ripeness, and mootness -- courts have too frequently attempted to resolve disputes not properly within their province. Other judicially created doctrines, such as expanded constructions of the judiciary's equitable relief powers and the multiplication of implied constitutional rights, have also invited more and more federal litigation.

Stopping and reversing the expansion of litigation in the federal system clearly requires the Congress and the Executive to re-visit some of the legislative and regulatory schemes that have given rise to large numbers of cases. It also requires greater doctrinal self-restraint by the courts themselves.

Moreover, there are currently pending before the Congress some proposals that could provide very significant relief for the federal courts. One proposal would eliminate practically all of the mandatory appellate jurisdiction of the Supreme Court. Under the current system of mandatory appellate review, the Court must decide many cases presenting no question of general importance or interest. This is the source of a great deal of uncertainty in the law. The court is required to review hundreds of such appeals on the merits, disposing of many in a summary fashion which often generates confusion because the relative weight to be attached to such decisions is unclear. Chief Justice Burger has argued that "all mandatory jurisdiction of the Supreme Court that can be, should be eliminated by statute." It is time that the Supreme Court were given full discretionary control of its appellate docket.

In another reform effort, the Department of Justice has recently proposed a major revision of the habeas corpus laws. The federal courts currently receive almost 8,000 filings annually from state prisoners seeking habeas corpus relief. The purpose of these petitions is, in general, to relitigate claims that have been unsuccessfully pursued through an entire state system and even the U.S. Supreme Court. Under our proposals, issues that have been "fully and fairly" litigated in the state courts could not be litigated again in federal court through petitions for habeas corpus.

A still more important initiative for reducing the federal overload is the proposal currently pending before Congress to eliminate diversity jurisdiction. The elimination of diversity jurisdiction would substantially relieve the current congestion of the federal dockets. Over twenty percent of all district court filings and ten percent of all appeals are diversity matters. Nevertheless, elimination of federal diversity jurisdiction would not impose a significant burden on the state court systems. It was recently estimated that states would experience an average increase in civil filings of only one percent if diversity were abolished. A resolution adopted by the Conference of Chief Justices in August 1977 noted that the state courts "are able and willing ... [to assume] all or part of the diversity jurisdiction presently exercised by the federal courts."

Diversity jurisdiction is based upon the belief that an out-of-state litigant would be treated more fairly by a federal than a state court. This rationale arose in a time when the nation was not so bound together by communication and transportation ties and when regional biases were stronger. Today, it cannot justify the continuation of diversity jurisdiction. Moreover, to require federal courts to spend their limited resources in applying state law in diversity cases diverts federal courts from their primary task of enforcing federal law. It also generates uncertainty in the state courts, which are unable to review and correct errors made by federal courts applying state law.

The elimination of diversity jurisdiction is, of course, a matter that has been debated in Congress for a number of years. We have now developed, however, a greater appreciation for the values of federalism and for the limitations in the capacity of the federal government. Perhaps, the elimination of diversity is a proposal whose time has finally arrived.

Past Congresses have failed to act in part because of resistance by elements of the litigating bar. Other things being equal, litigators would, obviously, prefer to have the added option of bringing a diversity matter to federal court. Each day, however, it should become more apparent to the litigating bar that it is in its clear interest to support strong measures to reduce the overload on the federal judiciary and enable the courts to handle their workload in a more considered and deliberate fashion. It is in our interest as attorneys to take whatever measures are necessary to protect the integrity and character of the judicial system.

Another suggestion that also merits serious consideration is the creation of special tribunals to decide certain types of disputes that do not by their nature require an Article III court. Federal regulatory and welfare programs, which have grown so dramatically, generate repetitious factual disputes of no interest to anyone other than the parties. They must now be presented to a federal court. These disputes -- which arise under laws such as the Social Security, Federal Employers Liability, Consumer Products Safety, and Truth-in-Lending Acts -- could be resolved just as fairly in an Article I tribunal. And they could then be resolved much more quickly and at a lower cost to the litigants.

Arguably, the review or resolution of the narrow type of factual questions that inevitably arise from a regulatory regime should not compete with the general criminal and civil jurisdiction for the attention of the federal courts. If a substantial question of constitutional or statutory interpretation arose, it could be referred to an Article III court. This suggestion is not new. It was made some five years ago by a Justice Department Committee headed by Judge Bork. Since then, however, growth both in the regulatory regime and the burden on federal courts make its serious consideration even more appropriate.

All of the ideas I have briefly discussed today are worthy of your fuller consideration. Judicial self-restraint, regulatory and statutory reform, changes in federal habeas corpus, the elimination of diversity, and the creation of Article I tribunals could improve the effectiveness of the federal judicial system.

In a book published just last year, one legal commentator wrote:

> "According to one widely quoted estimate, if the rate of lawsuits filed in federal courts alone during the decade 1965-1975 continues to increase as it has, by early in the next century federal appellate courts will hear more than 1 million cases annually -- and the appellate branch typically gets only a tiny fraction of the cases decided by the trial courts each year."

Such increases are unthinkable if the federal judicial system is to play the important role confided to it. Reform is not only important, it is essential. As Winston Churchill once wrote:

> "Things do not get better by being left alone. Unless they are adjusted, they explode with a shattering detonation."

The fuse is lit. It is up to all of us to avert the threatened explosion.

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

REMARKS

BY

WILLIAM H. WEBSTER

DIRECTOR

FEDERAL BUREAU OF INVESTIGATION

BEFORE

THE NATIONAL CONFERENCE OF BAR PRESIDENTS

AMERICAN BAR ASSOCIATION

NEW ORLEANS, LOUISIANA

AUGUST 8, 1981

SUMMARY

THE FBI HAS A RESPONSIBILITY TO REPORT ON ITS EXPERIENCE WITH LEGISLATION THAT HAS AN IMPACT ON ITS MISSION.

Introduction - Mention of UNIRAC/ABSCAM/priority case work. Note importance of information to law enforcement. (pages 1-2)

Freedom of Information and Privacy Acts - Purpose of laws good, but they have produced problems. Cost. Reducing flow of information from sources. (pages 2-7)

Tax Reform Act of 1976 - Purpose of Act to stop abuse of taxpayer information. But Act has made it too difficult for FBI to obtain information from IRS. (pages 7-11)

Conclusion - Review of this legislation will put us in a better position to strike balance of critical values (protection of society versus protection of individual rights). (pages 10-11)

Thank you, Roger, President Smith. Ladies and gentlemen, I first want to thank you for giving me another opportunity to appear before you. The last time I was here was about two and a half years ago at the midwinter meeting in Atlanta, Georgia. At that time I was just finishing my first year in my present position, and I talked to you about the goals of the FBI and how we proposed to reach those goals through a method of accountability and guidelines that would assure strict adherence to the rule of law.

In the last two and a half years you have seen some of our efforts to make realities out of our goals. Some of those cases have been relatively high visibility cases.

The UNIRAC case involved the investigation of racketeering in the docking industry from Miami to New York on the East Coast. It was one of the items that I mentioned. There had been some 60 indictments then. Since that time there have been over 120 indictments and over 105 convictions, including that of one of the top labor union officials, Anthony Scotto.

To that there have been added what I think have been some very impressive indictments and convictions against organized crime from the West Coast to the East Coast, ones which I won't stop to tick off except to say that they reach some of the very top figures in the organized crime enterprises that we have in this country today.

You have seen the results of the ABSCAM trials, and more recently, the BRILAB case here in New Orleans. Earlier this week, a very important grand jury presented a number of indictments which people believe will have a major impact on the cartels bringing illicit drugs into the United States.

In the process of all these efforts, we have been looking at and reviewing, as any good lawyer would, the rules under which we operate, the constraints under which we operate, and the legislation under which we operate. We are also examining and discussing the competing interests and values that we find in legislation affecting the Bureau. Today, I would like to focus on legislation that influences the management of information.

As all of us know, the key to effective law enforcement is information, whether it is to solve a simple bank robbery or to conduct the long-term undercover operations which you have seen so much of in the newspapers.

Access to information and the protection of the legitimate sources of information given to us on a confidential basis are vitally important to us and hence to the American public.

In the last several years, laws were passed that were designed to protect people's privacy and to open up government where it needed to be opened up. I refer now to the Freedom of Information and Privacy Acts and the Tax Reform Act of 1976.

These laws try to manage the availability of information. Because of that, they have a very strong bearing on what we in the FBI are doing.

These laws were designed to provide for an informed electorate and as remedies against possible abuses in government. But their effects have not always been salutary. We believe we have an obligation to weigh the impact of these laws on our work and to tell Congress of our findings. This process has been going on. Congress is now reviewing this legislation to determine whether these laws need to be fine-tuned.

I would like you to understand, as I try to discuss them with you today, that I am not urging or suggesting repeals or massive revisions in any of these statutes. We want to bring to bear the experience that we have had in law enforcement and the important values to be served by an effective law enforcement system in fine-tuning errors of drafting. We should have the courage to go beyond the symbolism of freedom of information to make sure that we are not doing damage to other important and valued interests in our society.

The Freedom of Information Act was drafted to accomplish a good end. Its purpose was to inform the public as fully as possible about the workings of government. Any citizen--in fact, any person or any organization from any country--was given the authority to request and receive information from the executive branch of Government. And many did. Promoting open government in this way was good in theory, but there were some negative consequences.

According to last year's figures, only five percent of requests received by us came from the press or legitimate researchers and scholars. In contrast, over 11 percent of the requests were from prisoners. For the Drug Enforcement Administration this figure reached about 40 percent. We don't believe all these prisoners were seeking information they should properly have. Some wanted to find out who helped the police put them in jail. Others wanted to learn about our capabilities and limitations in general to be better prepared to continue their criminal activities. It's hard to know what's in the mind of a requestor, but some requests are suspicious on their face. We know, for instance, that 137 requests were submitted by one prisoner who was a reputed organized crime hit man. In another case involving convicted murderer and Black Liberation Army leader Joanne Chesimard, officials found 327 individual FBI reports in her jail cell following her escape in 1979.

Public officials today are also utilizing the Act in connection with public corruption investigations. Subjects under investigation know that when we turn their requests down on the basis of an existing law enforcement investigation, we may well have an interest in them.

Now, the drafters of this legislation didn't intend for the Act to be used to undermine law enforcement. They created exemptions to protect critical information. Unfortunately, the exemptions don't always work. Not too long ago, we ran a test called Operation Mosaic where we went back and reviewed materials that had already been released. The exemptions had been applied, and we only released what we thought was safe material. But, the problem is that seemingly innocuous information can be combined with other information released perhaps at a different time to yield a clue. Sometimes, too, the requestor can fill in gaps with his own knowledge. Our reviewers don't have any idea what each individual requestor knows. Moreover, the provisions of the exemptions are narrow. It's not whether information would tend to identify an informant. We have to show that the information withheld would in fact identify him. Of course, I haven't even touched on the issue of human error. That's a separate problem. We've greatly minimized it, but it's still something to be considered.

In Operation Mosaic, our analysts were able to piece together clues and deduce information from released materials that should have been protected. We are extremely concerned about the unintended release of this information, but it's not our only worry. We have found that our sources are becoming increasingly cautious. They aren't confident we can protect their identities. I'm talking now about sources of every variety, not just criminal informants. There are judges, businessmen, other law enforcement agencies, even overseas police agencies,- who are refusing to cooperate. Whether they have a detailed understanding of how the law works or not--and some do--they just won't take a chance. Their *perception* is that it's not safe. This is reducing the information we get, and, though it's difficult to measure precisely, it's also reducing our effectiveness. This impact is perhaps greatest in our organized crime program and in our foreign counterintelligence program, areas where we need the cooperation of private citizens most.

There are other things to consider about FOIA. In 1980 we received over 15,000 FOIPA requests. The direct cost to us was $11.5 million. Government-wide cost was about $57 million. To administer our program properly, to try to meet the deadlines prescribed by the Act, we have almost 300 full-time employees processing these requests. This includes over 30 Special Agents. Even with this staff, because of the flood of requests, we weren't able to meet these deadlines.

You might be interested to know that when the amendments to the Act were passed in 1974, Congress estimated additional annual Government-wide costs to be between $40,000 and $100,000.

We believe that the Act should be fine-tuned to eliminate some of these problems. We have sent our recommendations and a report of our own experience to the Department of Justice. They will be working with the Congress to determine what corrective measures should be taken. It is not proper for me to discuss the specifics with you now. However, I think that the Act can be fine-tuned without gutting its essential provisions. We are committed to the purpose and philosophy of Freedom of Information. Whatever changes are made, I am confident that the law will remain an extremely useful vehicle for informing the public.

The Tax Reform Act of 1976 is another law that is affecting the flow of information we need to conduct criminal investigations. It was designed to prevent government abuse of tax information collected by the Internal Revenue Service. It says that IRS agents may not pass on information about crimes included on a taxpayer's return unless ordered by a judge. This seems reasonable, but troubling problems have arisen.

One is time. It takes too long to get information from the IRS. Delays average two months, but longer delays up to nine months are not unusual. Investigations cannot often be held up this long. The result is that we are forced to spend additional time seeking information that is already in the hands of the Government. Sometimes, we can't get it at all.

There is another problem associated with this law. Usually, we don't know what the IRS has. And they can't tell us that they have information relating to crimes and what the nature of the information is. With such information, we could go to a court and show the relevance of the information to our investigation. Without it, we're left in a Catch-22. We can't ask for what we don't know about.

There is one more very damaging consequence of this law. It prevents us from working closely with the IRS in cases in which we both have an interest. The IRS has highly skilled investigators capable of tracing funds and analyzing financial transactions connected with criminal activity--especially in the areas of white-collar crime, public corruption, and narcotics. Before the law was passed there was significant cooperation, sharing of information, and use of IRS expertise. Now Agent-to-Agent cooperation has ceased. This creates the duplication problem that I mentioned before, but it's more than that. Close coordination of effort sometimes yields results that neither agency could achieve separately.

I should emphasize that the problem is not with the IRS or the FBI but with the Act itself. At the same time, it's only human for our Agents to be resentful when a request sent to the IRS gets turned down. And this resentment isn't conducive to cooperation when it is possible.

Actual cases show just what a hamstringing effect the law is having. During an organized crime RICO investigation, two individuals called the mother of a Government witness. They identified themselves as IRS agents who were interested in locating her son. She gave them the information. Later, the son asked us to check to see if the callers were bona fide. We then called the IRS to determine if the contact was authentic, but they told us the Act prohibited confirming or denying it.

A second example involves a public corruption investigation of a state assemblyman. We believed he was illegally influencing the rezoning of property for his own gain. During our investigation, we discovered that the IRS had already conducted an investigation of this matter. Unfortunately, they were unable to furnish this information to us. We had no choice but to try to get it ourselves. We were eventually successful, and in this case, justice wasn't frustrated. But it came at much greater expense. It took six FBI Agents three months to accomplish what had already been accomplished, to provide information that was already held by another Government agency.

In a third case, we charged a drug smuggler with Federal narcotics violations. What we really wanted, however, was to bring additional charges under the RICO statute. This required IRS cooperation which we sought repeatedly without success. We contacted the U. S. Attorney's Office to see what could be done. But again, the word came back that the necessary and pertinent financial data could not be made available. As a result, we dropped the RICO portion of the case, and the subject was only charged with the much less substantial offense.

We presented these examples in testimony to Congress some time ago. They are also reviewing this law to determine to what extent it needs to be refined. As with the Freedom of Information Act, I don't believe it will be necessary or desirable to change the law so radically that it fails to accomplish what was originally intended. Controls and checks will remain; but disclosure procedures will be streamlined, and the factual showings required will be simplified and clarified. Taxpayer information will continue to receive substantial protection. And no information will be released without some kind of accountability.

Well, I have taken your time to tell you about some problem areas. As you know from what I said at the beginning, I am proud of the progress that we have made and the progress that we are going to continue to make, but we have to have the courage to say when we believe that the legislation has exceeded its intended purpose and created unreasonable restraints upon effective law enforcement.

In our society, there are two very important values to preserve. One is an almost sacred desire of our citizens to be let alone and the other is the increasingly selective demands of our society to be kept safe and free.

This requires the striking of a critical balance, and how we strike this balance, it seems to me, will determine our future as a land of ordered liberty.

We as lawyers must take our part in that decisive balance striking. In trying to present our case to you, we want you to understand that we are not against freedom of information or against protecting tax information.

We are trying to strike a difficult balance so that society can be kept safe and free without unnecessary intrusion into individual liberty.

We hope that you will help us in that difficult task.

Thank you.

THE EMERGING IDEAL OF COURT UNIFICATION

BY LARRY C. BERKSON

SCULPTURE BY EDITH LEVEE/PHOTO BY CHARLOTTE LEVEE

Little by little, scholars and reformers have outlined the main features of court unification. Here is how the idea became what it is today.

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The concept of court unification has been central to nearly every proposal for state court reform in this century. But like many emerging concepts, it means different things to different people. There seem to be as many definitions as there are individuals with ideas about how courts "ought" to be organized.

What follows should not be construed as advocating court unification. Although there is overwhelming normative support for the concept of court unification among judges, attorneys and practitioners, there is little empirical evidence that a unified system is "better" than a nonunified one. Indeed, two important theoretical works, one by David Saari and the other by Geoffrey Gallas in *The Justice System Journal*, have recently suggested that a highly centralized judicial system may actually be dysfunctional.[1] Both articles are provocative and persuasive, but before evaluating the consequences of court unification, we should agree on just what court unification means.

A review of the literature reveals a unified court system comprises five basic components: consolidation and simplification of court structure, centralized rule-making, centralized management, centralized budgeting and state financing. We will consider each of these in turn.

Consolidation and simplification

If any single element is at the heart of court unification, it is the consolidation and simplification of court structure. At the turn of the century, Roscoe Pound vehemently attacked the multiplicity of courts.[2] He wrote favorably of the English Judicature Act of 1873 that consolidated five appellate courts and eight courts of first instance into one Supreme Court of Judicature. That Act established a two-tier system that included a single court of final appeal and a single court of first instance. "This idea of unification," stated Pound, "has proved the most effective," and deserved "careful study of American lawyers as a model judicial organization."

Trial courts: Every scholar, jurist and commission member since Pound has agreed that the number of trial courts must be reduced but they have disagreed over the exact number that should exist. Pound originally suggested that there be only one, but in 1940 he revised his thinking. His famous "Principles and Outline of a Modern Unified Court Organization" proposes that the single Court of Justice (Supreme Court of Judicature) be composed of three branches instead of two.[3] At the apex of the hierarchy, there was to be a "single ultimate court of appeal." Next, there was to be a "superior court of general jurisdiction" for all civil and criminal cases "above the grade of small causes and petty offenses and violations of municipal ordinances." Finally, county courts should handle "small causes."

Between the two Pound statements, the American Judicature Society developed a model judicial article at the request of the National Municipal League.[4] It called for creation of a general court of justice with three departments: a supreme court, a district court and a county court. Its authors apparently intended the county court to have original jurisdiction over civil cases up to $500 and criminal misdemeanors. The

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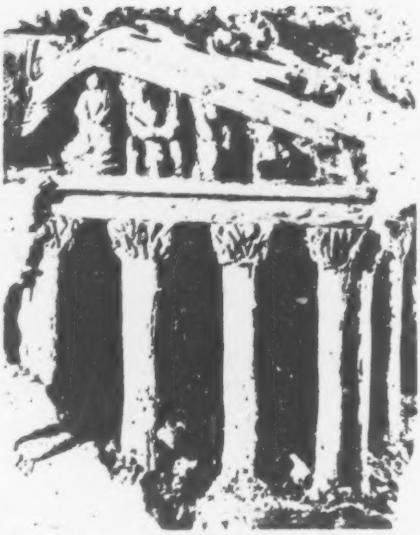
The author wishes to thank project director Allan Ashman for his valuable consultation and advice during the preparation of the article. A special note of thanks is also extended to James Alfini, Susan Carbon, Karen Knab and John Ryan who read and commented on earlier drafts.

[1] Geoffrey Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUSTICE SYSTEM JOURNAL 35-55 (Spring 1976) and David Saari, *Modern Court Management Trends in Court Organization Concepts–1976*, 2 JUSTICE SYSTEM JOURNAL 19–33 (Spring 1976).

[2] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, a speech delivered at the annual meeting of the American Bar Association in St. Paul, Minnesota, August 29, 1906, 20 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 178, 183 (February 1937).

[3] Roscoe Pound, *Principles and Outline of a Modern Unified Court System*, 23 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 225 (April 1940).

[4] *Model Judiciary Article*, 3 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 132 (February 1920).



district court was to have original jurisdiction in all other cases.

The Parker-Vanderbilt Standards of 1938 made only passing reference to the fact that states should adopt a unified judicial system and did not discuss court structure explicitly. It is clear, however, that the American Bar Association committee which developed those standards did at least implicitly approve the two-tier trial court system.[5]

Since 1940, there has been mixed reaction to the two-tier trial court proposal. The Municipal League's Model State Constitution of 1942 withdrew its explicit endorsement of the two-tier system, though the American Judicature Society continued its support.[6] In 1963, the League changed its position again and proposed "a supreme court, an appellate court and a general court, and . . . such inferior courts of limited jurisdiction as may from time to time be established by law."[7]

In 1962, the American Bar Association had also called for a two-tier trial court system, a trial court of general jurisdiction known as the district court and a trial court of limited jurisdiction known as the magistrate's court.[8] In 1967, the President's Commission on Law Enforcement and Administration of Justice implied its acceptance of the two-tier system when it determined that Michigan had "provided for a fully unified court system, including one statewide court of general jurisdiction and statewide courts of limited jurisdiction . . ."[9] The Advisory Commission on Intergovernmental Relations in 1971 also implicitly accepted the two-tier system when it stated that the North Carolina constitutional amendment of 1962 "provided for a unified judicial system consisting of a supreme court, superior court and district court."[10]

More recent commissions have rejected the two-tier trial court. In 1971, the National Conference on the Judiciary prescribed "only one level of trial court. . . . Separate specialized courts should be abolished."[11] The following year, the National Advisory Commission on Criminal Justice Standards and Goals recommended that "all trial courts should be unified into a single trial court."[12] In 1974, the American Bar Association Commission on Standards of Judicial Administration declared, "The court of original proceedings should be organized as a single court."[13] That same year, the Minnesota Judicial Council stated that a unified system "[h]as only one trial court."[14]

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[5] Arthur T. Vanderbilt, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 263 (The Law Center of New York University, 1949). *See also, Standards of Administration Adopted,* 22 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 66 (August 1938).

[6] *Model Judiciary Article and Comment Thereon,* 26 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 51, 53 (August 1942).

[7] National Municipal League, MODEL STATE CONSTITUTION 21 (New York: National Municipal League, 1963).

[8] Glenn R. Winters, *A.B.A. House of Delegates Approves Model Judicial Article for State Constitutions,* 45 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 279, 280 (April 1962).

[9] President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS 83 (Washington: Government Printing Office, 1967).

[10] Advisory Commission on Intergovernmental Relations, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 91 (Washington: Government Printing Office, 1971).

[11] National Conference on the Judiciary, *Consensus Statement of the National Conference on the Judiciary* in JUSTICE IN THE STATES 266 (St. Paul: West Publishing Co., 1971).

[12] National Advisory Commission on Criminal Justice Standards and Goals, COURTS 164 (Washington: Government Printing Office 1973).

[13] American Bar Association, STANDARDS RELATING TO COURT ORGANIZATION 17 (Chicago: American Bar Association, 1974).

A number of commentators, such as Glenn R. Winters[15] and James Gazell,[16] also prefer the single trial court. Others have been reluctant to take a stand or have shifted their positions. Perhaps Allan Ashman and Jeffrey Parness best reflect the recent scholarly thinking on the subject.

> One state-wide court of general jurisdiction probably is all that is required within a unified court system. However, under certain circumstances, a state-wide limited jurisdiction court might function quite well and differ little from divisions of a single state-wide trial court of general jurisdiction which handles only minor matters. Consequently, it is possible for a system with two, three or even four levels of courts to be characterized as having a simplified court structure. The key lies not in the number of courts handling cases but in the state's method for handling cases brought before its courts.[17]

Intermediate appellate courts: Roscoe Pound did not contemplate an intermediate court of appeals. In 1940, he explicitly rejected the idea, saying "there would be no need of intermediate tribunals of any sort." The American Judicature Society and its representatives have agreed. For example, in 1967, Glenn Winters wrote a compelling argument for consolidating intermediate appellate courts with supreme courts.[18]

But the majority of proposals in the past two decades have recommended an intermediate court of appeals. The American Bar Association's Model Judicial Article of 1962, the National Municipal League's Model State Constitution of 1963, the American Bar Association's Standards of 1974, and the Minnesota Judicial Council Report of 1974 have all endorsed such a court, and other reports have given implicit approval. Indeed, the American Judicature Society currently supports this reform.

Despite the growing acceptance of intermediate appellate courts, such courts may not be essential to a unified court system. There seems to be an unstated assumption in many proposals that intermediate courts of appeal should be established only in states burdened by extremely heavy caseloads. This notion was made explicit by the National Conference on the Judiciary:

> If the appellate caseload is too great for a single court to adequately perform its tasks of correcting errors, developing law and supervising the courts below, serious consideration should be given to creating an intermediate appellate court.[19]

As has been observed, considerable disagreement has prevailed over the exact structure which best typifies a simplified and consolidated state court system. The four principal models which have emerged are presented in Figure 1.

Pound's 1906 model has little support among modern scholars. In practice, it is found only in Idaho and South Dakota.[20] The Pound model of 1940 is more popular among scholars, but it, too, is found in a pure sense in only three states: Hawaii, Rhode Island and Virginia. Twenty-four states diverge from this model because they have intermediate courts of appeal.[21] Others have more than two trial courts and thus do not fit the model.[22]

The 1962 ABA model exists only in Florida and North Carolina. California and Maryland approach this model. Only Illinois and Iowa follow the ABA model of

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[14] Minnesota Judicial Council, A SURVEY OF UNIFIED COURT ORGANIZATIONS 6 (1974).

[15] *See, e.g., The Case for a Two-Level State Court System*, 50 JUDICATURE 185 (February 1967).

[16] James Gazell, *State Trial Courts: An Odyssey into Faltering Bureaucracies*, 8 SAN DIEGO LAW REVIEW 275, 331 (March 1971). In a later article he recognized the utility of both models. *See* Gazell, *Lower-Court Unification in the American States*, 1974 ARIZONA STATE LAW JOURNAL 653.

[17] Allan Ashman and Jeffrey Parness, *The Concept of a Unified Court System*, 24 DEPAUL LAW REVIEW 1, 29–30 (Fall 1974).

[18] *The Case for a Two-Level State Court System*, *supra* n. 15.

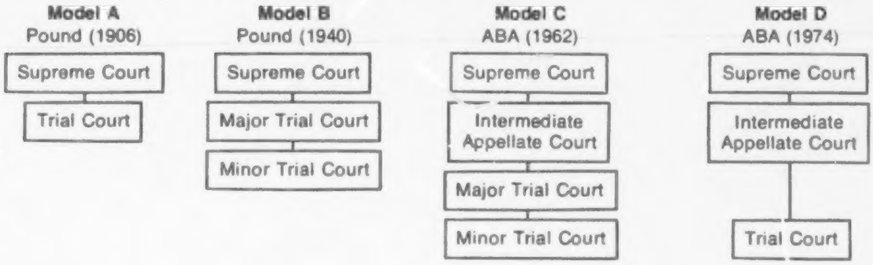
[19] National Conference on the Judiciary, *supra* n. 11. *See also*, Advisory Commission on Intergovernmental Relations, *supra* n. 10, at 88.

[20] *See* Law Enforcement Assistance Administration, NATIONAL SURVEY OF COURT ORGANIZATION (Washington: Government Printing Office, 1973) and SUPPLEMENT (1975).

[21] Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, and Washington.

[22] Alaska, Connecticut, Kansas, Kentucky, Maine, Minnesota, Montana, Nebraska, Nevada, New Hampshire, North Dakota, South Carolina, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

Figure 1
Models of state court organization



1974. Most states do not fit the model because they have too many trial courts. Alabama, New York, Oklahoma, Pennsylvania, Tennessee and Texas have more than one intermediate appellate court.

To summarize, proponents of court unification generally agree that court structure should be consolidated and simplified. There should be no more than one trial court of general jurisdiction, no more than one trial court of limited jurisdiction and no specialized courts. Despite some controversy, the trend also appears to be in the direction of creating an intermediate appellate court when caseloads warrant it and creating a single trial court of original jurisdiction.

Centralized rule-making

Before 1848, American courts controlled their own procedure. But in that year New York adopted the Field Code which eventually served as a model for almost all the other states. It divided responsibility for judicial administration between the judiciary and the legislature. The result was almost total legislative control.

By the turn of the century, reformers could see the negative effects of the Field Code and were suggesting alternatives. In October 1914, the American Judicature Society published the first draft of its State-Wide Judicature Act which proposed vesting most rule-making authority in a judicial council.[23] This position was reiterated in the second draft in 1917.[24] The council was to be granted authority to (1) reduce or expand the number of judges of any superior courts, (2) make court rules prescribing the duties and jurisdictions of masters and district magistrates, (3) make, alter and amend all rules relating to practice and procedure, and (4) establish all rules and regulations relating to clerks and jury commissioners. The National Municipal League's Model Judicial Article of 1920 also placed rule-making power within a judicial council.

By 1938, these proposals had fallen into disfavor. The American Bar Association recommended that "full rule-making power be vested in the courts," and in 1940, Roscoe Pound agreed that the rule-making power should be "restored" to the judiciary. Two years later the National Municipal League adopted a revised judicial article, which provided the councils with essentially the same authority as the 1920 model but subjected their power to regulation by the legislature.

By 1962, proposals vesting rule-making power in any body other than the state's highest court were rare. That year, both the American Bar Association and the National Municipal League proposed that state supreme courts should have full rule-making authority over court practice and procedure. In keeping with its 1942 recommendation, however, the League still envisioned a role for the legislature, albeit a more limited one.

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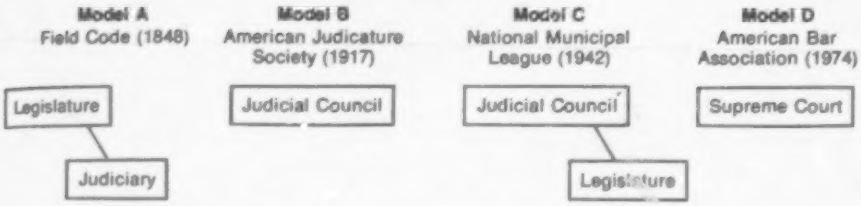
[23] American Judicature Society, *First Draft of a State-Wide Judicature Act*, BULLETIN VII 137–39 (October, 1914).

[24] American Judicature Society, *Second Draft of a State-Wide Judicature Act*, BULLETIN VII-A 77–80 (March, 1917).

Figure 2
Models of rule-making



In this recommendation, the League provided that court rules could be changed by a two-thirds vote of the legislature.[25] Since the League's proposal, almost every commission report, scholar and jurist has recommended that rule-making authority be vested in the state's highest court.

Four major models that discuss the locus of rule-making authority have evolved since 1914. They are summarized in Figure 2. The ABA model (1974) closely approximates the situation in most states today. Thirty-two states vest the authority exclusively in the supreme court.[26] Eight place it partially in the court, and ten place it elsewhere—either in judicial councils or state legislatures. The legislature has no veto power over rules promulgated in twenty-one of the thirty-two states where the court has exclusive rule-making authority.

To summarize, all recent court unification proposals recommend that rule-making authority be vested in the supreme court, unencumbered by legislative veto.

Centralized management

In the first and second drafts of its State-Wide Judicature Act (1914 and 1917), the American Judicature Society divided administrative responsibility for the judicial system between a council and the chief justice. For example, the council was assigned the power to appoint the clerk of the General Court of Judicature and to establish clerk's offices throughout the state. The chief justice was granted authority to assign judges to the various divisions of the court, direct judges to perform judicial duties in two or more divisions, and transfer cases from one division to another.

Among early reformers, the idea of strong centralized management was still immature. In 1920, the National Municipal League suggested that the judicial council should regulate the duties of the clerk and his subordinates and all other ministerial officers, while the chief justice should gather and publish an annual report on the business of the courts and the state of the dockets. The chief justice was granted authority to nominate the clerk of the General Court of Justice and assign district court judges. Control over calendars and the assignment of judges within district and county courts was given to the local presiding judge.

As the years passed, however, it became clear that if the courts were to be managed efficiently, administrative authority had to be vested in a single agency or individual. The famous Parker-Vanderbilt Standards of 1938 admonished the states to provide "a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage."[27]

Commenting on the Standards in 1949, Vanderbilt listed eight principal facets of this area of court management: assignment of judges to specialized duties, reassignment of judges to different courts, reassignment of cases, uniform record keeping, periodical reporting by judges about their work, appointment of court personnel, administering court personnel, and centralizing the financial affairs of the judicial branch.[28]

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[25] National Municipal League, *supra* n. 7, at 14.

[26] *See* Jeffrey Parness and Chris Korbakes, A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES (Chicago: American Judicature Society, 1973).

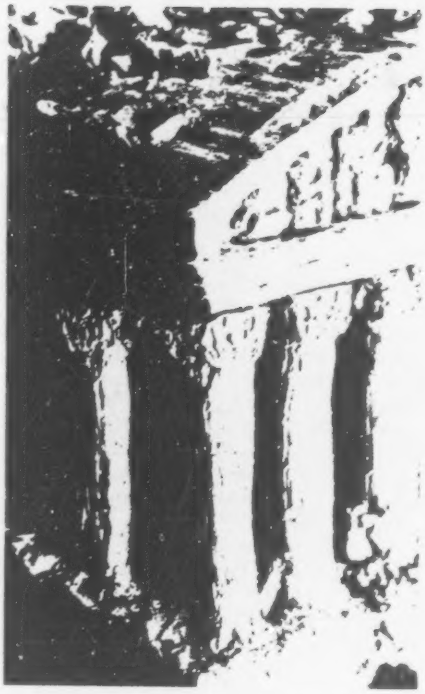
[27] *Standards of Judicial Administration Adopted*, *supra* n. 5, at 67.

A number of proposals followed Parker and Vanderbilt in suggesting that authority for managing the courts be vested in the judiciary. The majority suggest that the chief justice of the supreme court be granted this responsibility. In his 1940 proposal, Pound expressed this idea in detail:

> Supervision of the judicial-business administration of the whole court should be committed to the chief justice. . . . He should have authority to make reassignments or temporary assignments of judges to particular branches or divisions or localities according to the amount of work to be done, and the judges at hand to do it. Disqualification, disability or illness of particular judges, or vacancies in office could be speedily provided for in this way. He should have authority also . . . to assign or transfer cases from one locality or court or division to another for hearing and disposition, as circumstances may require, so that judicial work may be equalized so far as may be and clogging up of particular dockets and accumulation of arrears prevented at the outset.[29]

Pound also thought that nonjudicial personnel should be placed under the control of the courts. "The judiciary," he stated, "is the only great agency of government which is habitually given no control over its clerical force." He recognized that the chief justice might require administrative assistance and proposed that "competent business direction should be provided and the clerical and stenographical force be put under control and supervision of a responsible director." He even went so far as to suggest that such officers might be needed in every branch, major division or regional court. Thus, Pound was one of the first reformers to anticipate the need for court administrators. Moreover, it is clear that he did not believe these positions could be filled by court clerks, as he was very critical of the court clerks' performance during the previous century.

Every major study since 1942 has advocated placing administrative responsibility for the court system in the chief justice, and nearly all have called for the establishment of a court administrator's office to aid him in this endeavor. But while it is easy to agree on who should possess central management authority, it is less easy to define what that authority should entail.



There is general consensus that the court administrator should not handle any judicial functions, including all aspects of adjudication and courtroom procedure. Unfortunately, the dichotomy between judicial and nonjudicial duties is not always rigid. It is often difficult to decide whether a particular function, such as transfer and assignment of judges, is a judicial or nonjudicial responsibility.[30]

Another contested question is whether trial court administrators should be appoint-

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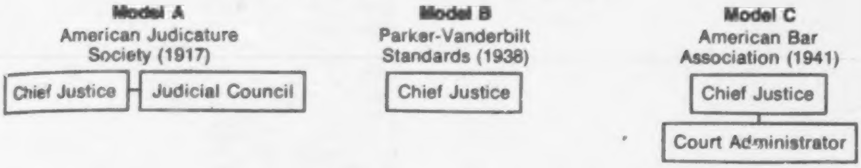
[28] Vanderbilt, *supra* n. 5, at 34–35.

[29] Pound, *supra* n. 3, at 229.

[30] *See* Steven Hays and Larry Berkson, *The New Managers: Court Administrators*, in Larry Berkson, Steven Hays and Susan Carbon, MANAGING THE STATE COURTS: TEXT AND READINGS (St. Paul: West Publishing Co., 1977), forthcoming.

Figure 3
Models of centralized management


Model A
American Judicature Society (1917)
Chief Justice
Judicial Council
Model B
Parker-Vanderbilt Standards (1938)
Chief Justice
Model C
American Bar Association (1941)
Chief Justice
Court Administrator

ed and supervised by the bureaucratically superior state court administrator's office. Recent commission reports have answered that they should. The Advisory Commission on Intergovernmental Relations recommended that administrative offices of local trial courts "be headed by professional administrators and be under the general supervision of the state court administrator."[31] The National Advisory Commission on Criminal Justice Standards and Goals also proposed that "local trial court administrators should be appointed by the state court administrator."[32] Under this system, policies are developed at the top of the hierarchy and are uniformly implemented throughout the system. Proponents argue that such a system is essential for coordination, accountability and continuity.

But some reformers disagree. The American Bar Association recently recommended that the trial court executive "be appointed by the presiding judge of the court in which he serves, with the advice and approval of the judges of that court and should serve at the pleasure of the presiding judge."[33] A number of scholars have also questioned the wisdom of central appointment and control of trial court administrators. The intensity of the debate makes it clear that centralized appointment and supervision has been a major component of the conventional thinking on court unification.

Other aspects of centralized management are more widely accepted. Recent studies and reports list an enormous quantity of roles, functions, duties and responsibilities of the state court administrator in a unified system. These will be summarized shortly.

Three models of centralized management have evolved, and are shown in Figure 3. The American Bar Association's proposal is most widely accepted and used. All but three or four states presently employ court administrators, and in nearly every state this official is appointed by the chief justice or the supreme court.[34] In California, Georgia and Texas, however, he is appointed by the judicial council. In Connecticut, he is appointed by the general assembly.

To summarize, a unified court system will be centrally managed by the chief justice who is assisted in his administrative responsibilities by a state court administrator.

The supreme court will control the assignment of judges and cases , the qualifications, hiring and firing of nonjudicial personnel, space and equipment, centralized record keeping and statistics gathering. It will also have authority over centralized planning, financial administration, educational programs for all court-related personnel, and research for the state court system. Finally, it will disseminate information about the operations of the state court system.

Centralized budgeting

Centralized (unitary) budgeting was not mentioned by early supporters of unification. In the past two decades, however, reformers have consistently argued that a court system is not unified unless it has a centralized budget.

This sentiment was first expressed in the American Bar Association's Model Judicial

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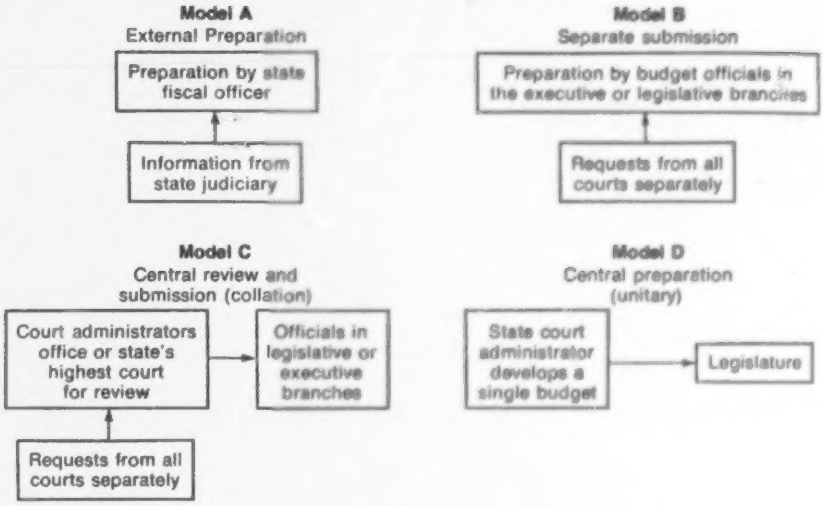
[31] Advisory Commission on Intergovernmental Relations, *supra* n. 10, at 39.

[32] National Advisory Commission on Criminal Justice Standards and Goals, *supra* n. 12, at 183.

[33] American Bar Association, *supra* n. 13, at 89.

[34] Rachel Doan and Robert Shapiro, STATE COURT ADMINISTRATORS 124–25 (Chicago: American Judicature Society, 1976).

Figure 4
Models of court budgeting


Model A
External Preparation
Preparation by state fiscal officer
Information from state judiciary
Model B
Separate submission
Preparation by budget officials in the executive or legislative branches
Requests from all courts separately
Model C
Central review and submission (collation)
Court administrators office or state's highest court for review
Officials in legislative or executive branches
Requests from all courts separately
Model D
Central preparation (unitary)
State court administrator develops a single budget
Legislature

*Derived from Carl Baar, *Separate But Subservient: Court Budgeting in the American States* (Lexington: D.C. Heath and Co., 1975), pp. 11–20.

Article of 1962 which called for the preparation and submission of the budget by a court administrator under the direction of the chief justice. The following year the National Municipal League was more precise: "The chief judge shall submit an annual consolidated budget for the entire unified judicial system."[35]

The concept was not discussed by the President's Commission on Law Enforcement and Administration of Justice, the Advisory Commission on Intergovernmental Relations, or the Committee for Economic Development, but it was dealt with implicitly in the National Conference on the Judiciary in 1971. The conference charged the state court administrator with "developing and operating a modern system of court management including *up-to-date budgetary techniques*" (emphasis added).[36]

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that "a budget for the operation of the entire court system of the State should be prepared by the state court administrator and submitted to the appropriate legislative body."[37] The following year the American Bar Association was equally specific: "The financial operations of the courts, including salaries of personnel and operating and capital expenditures, should be managed through a unified budget that includes all courts in the system."[38]

The principal aspects of centralized budgeting are more clearly defined than those of centralized management. The fundamental precept is that the budget be prepared centrally, preferably by the state court administrator. The executive and legislative branches do not participate, nor do they have the

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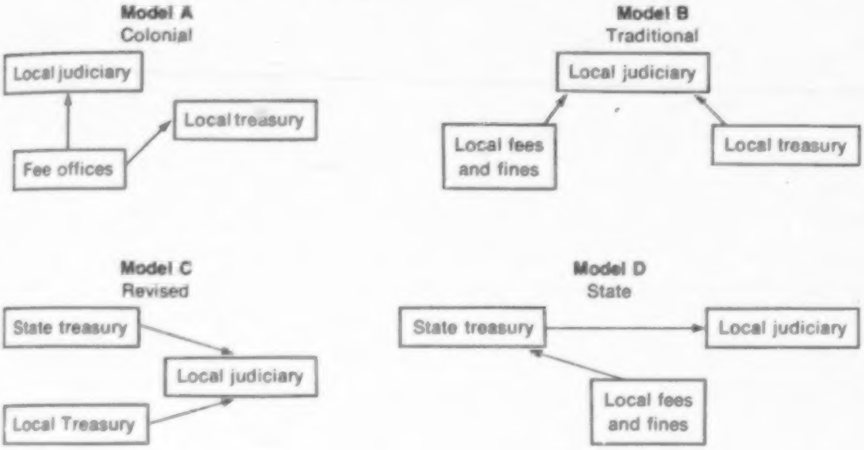
[35] National Municipal League, *supra* n. 7, at 14.

[36] National Conference on the Judiciary, *supra* n. 11, at 265.

[37] National Advisory Commission on Criminal Justice Standards and Goals, *supra* n. 12, at 176. *See also* 164.

[38] American Bar Association, *supra* n. 13, at 3. *See also* 98.

Figure 5
Models of court financing


Model A
Colonial
Local judiciary
Local treasury
Fee offices
Model B
Traditional
Local judiciary
Local fees and fines
Local treasury
Model C
Revised
State treasury
Local judiciary
Local Treasury
Model D
State
State treasury
Local judiciary
Local fees and fines

authority to veto the judicially prepared budget.

Only twelve states approach the ideal.[39] At the opposite extreme are states in which the budget is prepared outside the judicial branch.[40] Between these poles are two variations. First are states in which budgets are prepared by each local court but are subject to review by a central staff and are then passed along to the appropriate executive or legislative officials.[41] Second are states in which different parts of the state court system prepare and submit separate requests to officials in the executive and legislative branches.[42] Figure 4 summarizes the four major models.

The prevailing opinion on centralized budgeting in a unified system appears to be that the instrument should be centrally prepared at the state level. Neither the executive nor the legislative branch should be able to veto the judicially prepared budget.

State financing

State financing is related to but distinct from centralized budgeting, although some will disagree. A recent article on the subject considers the two interdependent: "Unitary budgeting . . . is a comprehensive system in which all judicial costs are funded by the state through a single budget administered by the judicial branch."[43] But the topics have traditionally been treated separately. Moreover, as Carl Baar points out, states may support their judicial systems by statewide funding but still not use the administrative technique of central budgeting.

Early reformers were not particularly concerned with state funding of the judiciary, though the National Municipal League did recommend in 1920 that "all remuneration paid for the services of judges and officials . . . shall be paid by an appropriation of the Legislature and shall be reckoned as part of the expense of the judicial establishment."[44] All fees and fines were to be paid to the clerk who in turn passed them along to the state treasurer. This recommendation remained substantially the same in the League's revised model of 1942. The 1963 revision was even more explicit, stating that "the total cost of the [court] system shall be paid by the state."[45]

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[39] Alaska, Colorado, Connecticut, Hawaii, Minnesota, New Jersey, New Mexico, North Carolina, Rhode Island, Tennessee, Vermont and Virginia. *See* Carl Baar, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 13 (Lexington: D.C. Heath, 1975).

[40] States clearly within this category include Georgia, Texas, Utah, West Virginia and Wisconsin. *Id.*

[41] States clearly within this category include Arizona, Delaware, Idaho, Illinois, Michigan, Ohio, and South Carolina. *Id.*

[42] States clearly within this category include Alabama, Maine, Maryland, Massachusetts, Missouri, Nebraska and Washington. *Id.*

[43] Geoffrey Hazard *et al.*, *Court Finance and Unitary Budgeting*, 81 YALE LAW JOURNAL 1286, 1293 (June 1972).

Nearly every commission since 1963 has recommended a similar approach. In 1967, the President's Commission on Law Enforcement and Administration of Justice recommended that all fines and fees be paid to the state treasury. In 1971, the National Conference on the Judiciary admonished that "courts should be organized into a unified judicial system financed by and acting under the authority of the state government, not units of local government."[46] The following year, the Committee for Economic Development recommended that states should assume full responsibility for financial support of the courts, as did the National Advisory Commission on Criminal Justice Standards and Goals in 1973.

Although the American Bar Association's Model Judicial Article of 1962 did not refer to state financing, the omission was corrected in its standards of 1973: "Responsibility for the financial support of state court systems should be assumed by state government."[47] Scholars have likewise cited it as a central principle of unification.

Historically, several methods have been used to fund the courts. Figure 5 presents the major variations. During the colonial and revolutionary periods and the eighteenth century, local fee offices supported much of the judicial structure and excessive revenues were generated and paid to the local treasuries. As the nation became more urbanized and fee offices came under attack, schemes were devised in which at least part of the taxes collected locally were allocated to the courts. As the pressure to generate new revenue increased, states began sharing the burden.

Today, there is wide variation in the amount of funds each state provides its judiciary. Seven states fund 80 per cent or more of the judical budget,[48] and ten states provide less than 20 per cent of the judicial budget.[49] To summarize, the current consensus appears to be that the state should finance the entire judicial system. Local fees and fines should be paid directly to the state treasury.

Conclusion

Thus, the emerging ideal of court unification comprises five essential elements: structural consolidation and simplification, centralized rule-making, centralized management, centralized budgeting and state financing. Such a system is only ideal in the sense that it represents the collective wisdom of a majority of scholars and practitioners. Whether it is the "best" system of organization is another question.

As was noted at the outset of this article, scholars are presently challenging the conventional wisdom of court unification, at least in theoretical fashion. Delineating the ideal model should facilitate such an inquiry. It is time to weigh the pros and cons of unification and to test its consequences empirically. Only after undertaking such research can we confidently prescribe unification as a useful structure for promoting court reform. ☐

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[44] *Model Judiciary Article, supra* n. 4, at 141.

[45] National Municipal League, *supra* n. 7, at 14.

[46] National Conference on the Judiciary, *supra* n. 11, at 265.

[47] American Bar Association, *supra* n. 13, at 97.

[48] Alaska, Connecticut, Hawaii, New Mexico, North Carolina, Rhode Island, and Vermont. See Baar, *supra* n. 39, at 6–7.

[49] Arizona, California, Florida, Georgia, Massachusetts, Michigan, Minnesota, Ohio, South Carolina, and Washington. *Id.*

NOBODY'S SOFT ON CRIME ANYMORE

RETHINKING AMERICA'S IMPOSSIBLE PROBLEM

BY FRANK BROWNING

PHOTOGRAPHY BY JANE O'NEAL

THE KILLING

Richmond, California, is a flat place, full of brown and green bungalows and wrapped in railroad tracks. It is one of the homes of Standard Oil, the western terminus for the Santa Fe Railroad, birthplace of the Hells Angels, a recruiting ground for the Ku Klux Klan. It is also home for a growing underclass of unemployed and unemployable black Americans who live on the streets, deal dope, lace their smokes with angel dust and pack .45s. Last year Freddy Riles* was one of them.

The incident was a simple one. Riles, a quiet, modest man, 36 years

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**The names of the principals involved in this case have been changed for this article.*

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old, stopped at the corner of MacDonald Avenue and Second Street. Several other men were standing around talking. One of them, Jimmy Bowers, had a bag of marijuana but no pipe or rolling papers. Riles offered his papers. In turn he expected a hit from the joint. He was wrong.

The argument that erupted continued over the next two days until an open fight flared between the two men on another street corner. Shots were fired. Within moments Bowers lay dying on the sidewalk. David Short, with him at the time, was wounded. Freddy Riles had shot them both.

Roberta James is a private investigator in Berkeley and a long-time activist. It was when she met Freddy Riles that she began to ask political and moral questions about her work in the criminal justice system. As an investigator for the defense on the case, James set out to gather statements from the witnesses to prove that Riles had fired his gun in self-defense. Her first task was to find the facts that would persuade the court to release Riles on bail.

Winning release on bail is standard procedure for any defense attorney. But in this case the defense had a further objective—to avoid a trial altogether by arranging a "reconciliation" between the parties, whereby they would agree to settle their differences "out of court." James had been involved in this approach before. The method is a sort of child of the '60s, an attempt to do away with the expense and misery of long trials and prison sentences, which only exacerbate crime, do nothing to reform criminals and take power from the communities in which the crimes occurred. In this case, the possibility of a reconciliation took form when David Short, Bowers' friend, agreed to talk to James.

"David agreed that Freddy shouldn't have to go to jail for this," James remembers. "He even told me how to get in touch with some of the other witnesses. I figured that the right political approach was that this was a street argument; it had been hustled on the street and, as heinous as we might see it, it was something the community could best deal with.

"We got Freddy out of jail. We even got David's help to build a case that could free him altogether. The one thing I always believed, as a good radical, is that however bad violent crime may be, it is equally criminal to lock people up in brutal and vicious cages like San Quentin or Folsom prison, where a guy almost always comes out worse, more violent, than he went in. If there's a real conflict between people in the community, then everybody in that community is better off, including the people who are fighting, when they try to resolve the trouble themselves.

"With David's cooperation, I felt we had a breakthrough. It showed that Freddy probably had fired in self-defense, that he wouldn't have his life ruined in prison, that both men could settle their differences without either of them feeling like a victim."

The hopeful reconciliation that Roberta James had imagined was never to be. A month later, David Short and Freddy Riles met and worked it out. At about four a.m., Short walked out of a bar on MacDonald Avenue, near the scene of the initial shooting. He stepped from behind a bush, placed his .45 just in back of Freddy Riles' head and pulled the trigger. Riles fell to the sidewalk.

"Hey, he's still alive," one of Short's friends said.

Short put the muzzle of his gun to Riles' throat and fired again. "He ain't now," he said.

With the Freddy Riles case, Roberta James was for the first time confronted by a community person, a serious, middle-aged black woman, on the issue of street crime. "Honey," the woman said, "there ain't nothing political about this case at all. There's no way I want to keep these guys on the street. If that's revolutionary, then I don't want none of your revolution." Handling the problem on the street, the woman said, meant that everybody—herself included—had to carry guns for their own defense. It meant that anybody who didn't carry a gun was either a fool or a victim, or both.

The death of Freddy Riles and the death of the man Riles killed pose a dilemma that traditional criminal lawyers—men like F. Lee Bailey, Melvin Belli, Racehorse Hanes—and their investigators have always neatly avoided. For them the trial lawyer's duty is to provide a client with the best possible legal defense with no direct concern over guilt or innocence, or over the welfare of the community or of society in general. But for those who would change society, and especially for the radicals and activists who entered the legal system specifically because of their commitment to social justice, cases like that of Freddy Riles are a wrenching and everyday experience.

Early in February, a group of lawyers met in a hall in Berkeley to talk about crime. Members of the Northern California chapter of the leftist National Lawyers Guild, many of them had spent the past year meeting in small, informal gatherings to evaluate what responsibility they had, as lawyers, as activists and as citizens, to confront the rising fear of crime in the nation. Privately, nearly all had expressed the same anguish and frustration that Roberta James felt in the wake of Freddy Riles' murder. Yet during an hour and a half of public panel discussion, none of that passion even came close to surfacing.

Then one woman stood up. She was both a friend and colleague to the panelists and others in the room.

"I cannot believe," she said, her voice clear but impassioned, "that we've been sitting here for two hours talking about crime and no one has mentioned the fear that millions of women feel every night they walk home. I cannot believe that a group of progressive lawyers has not even once talked about the fear of violent rape that terrorizes women in every city in the country. I cannot believe that you have not talked about the constant fear of assault that plagues women and old people every day. I am astounded that this group could have held a discussion on a progressive approach to crime and not even mention concern for the victims of violence."

That woman's complaint cuts to the core of our failure to speak convincingly about crime in America. It is a momentous failure, both because we have abdicated the dialogue about crime to the reactionary Right and because it signals a callous disregard for one of the most pressing concerns facing Americans today.

In our confusion, some of us have warmed to the campaign of the hardliners. These are the people who argue wrongly, that crime and acts of violence are rising astronomically. They call for more police and more prisons, oblivious to the fact that, historically, these solutions have *never* worked to reduce crime.

Others, including those who still identify themselves as "progressives," have refused to shed their own pretensions about the meaning of crime. Part of that refusal is an unwillingness to acknowledge the roots of our own romance with violence. We have clung, instead, to an apocalyptic and utopian imagination which denies action. As a result, we have failed to understand that those at the bottom of society often relieve the endless tedium they face through violence, a violence which then becomes routine and banal. And because of that, we have failed to take seriously and speak forcefully about those truly hopeful alternatives that have begun to appear, like primroses in a desert of desperation.

THE ROMANCE

Just a decade ago some of Berkeley's leading activists regularly staged demonstrations outside San Quentin Prison and lauded the inmates as the leaders of the coming revolution. The Prison Law Project, founded by prominent radical attorney Fay Stender, dedicated itself to the support of revolutionary prisoner movements. Three years ago Stender was shot in her Berkeley home (and paralyzed as a result) by a former inmate who claimed that she had betrayed that movement.

A month later, David Short met Freddy Riles out on the street. He came from behind, put a .45 to Freddy's head and pulled the trigger.

Eleven years ago I wrote, somewhat breathlessly, of the progressive potential of the then-a-borning prisoners union movement, a movement I believed would help to liberate that portion of humanity we now see described as the underclass. It did not. There are more prisons (and prisoners) now than ever before, and the membership in the underclass grows daily.

In the '60s, to affirm one's solidarity with the prisoners was not only to stand against class oppression, but it was also to withdraw from the polite discourse in which the genteel reformists bantered endlessly about ushering the dispossessed into the drawing room of civilization. We would instead commit "revolutionary suicide," in Huey Newton's tantalizing phrase, and in one stroke destroy both the drawing room and the jail cell. We would storm the Bastille and loose the Revolution.

But a funny thing happened on the way to the barricades. The revolutionary movements began to turn upon themselves, albeit with considerable help from the COINTELPRO operations of the FBI and the CIA. In San Francisco, one of the revolutionary Soledad Brothers left prison only to launch a new career of robbery, assault and rape—often against his own comrades. More devastating, there came a series of murders within the ranks of the Black Panther party, murders that were not committed by the police, but which instead seemed to reflect the fate of winners and losers in party infighting. And then there was the slaying of a bookkeeper, a white woman who had worked at *Ramparts* magazine. She had been introduced to the Panthers by one of the magazine's editors and, apparently, had had the misfortune to become aware of some party members' unsavory drug deals. Even if abstractly it might be argued that proletarian violence was the fruit of centuries of racism and economic oppression, nonetheless, an innocent human being, one who had committed herself to fighting oppression, had been slaughtered—not at the hands of the state, but by those she fought to free.

Until then the rhetoric and the imagery of violence had served as something of a political aphrodisiac for many on the left. As one Berkeley wall slogan had it, we entered the age of "Armed Love." There were a people who, because they lived "on the edge," stood free of the nauseating immobility of bourgeois culture. To affirm that we were alive, to reassure ourselves that we were not merely wallowing in alienated passivity, to earn the respect (we thought) of Che and Ho and Fanon, to declare that we were not merely diners at the banquet hall of moribund, genteel liberalism, we took what seemed to be a revolutionary leap. Violence as transcendence, crime as liberation, bank robbery as commitment: it was a romantic compulsion that wound its way about the Left throughout the '60s and '70s, until it smacked down against a Brinks guard in Nyack, New York, several months ago, and we were all forced to acknowledge that murder and liberation are not always cut of the same cloth.

San Francisco lawyer Beverly Axelrod characterizes that time as a period of "extraordinary naiveté" when it came to prisoners and crime. Axelrod spent years working with youth gangs and hard-time prisoners as well as with civil rights and antiwar activists. More than anyone else she was responsible for transforming the powerful but often rambling letters of Eldridge Cleaver into *Soul on Ice*.

"The Left," she said, recalling some of the illusions of the past, "was usually very careful in analyzing the working class. But people should have realized that there's a different kind of oppression among prisoners than there is with other people. Too often they were dealt with just like the altruistic people who came in to lick envelopes. . . . Prisoners, particularly black prisoners, have been forced to learn how to manipulate 'whitey.' There is no reason not to assume they'd manipulate lefty whites just like anybody else."

Naiveté, romance, the incessant insecurity of the intellectual when confronted with real, live proletarian heroes: all these combined to keep the Left from thinking cogently about crime and criminals. "Keep the brother on the block and out of the joint" was the limit of the Left's program on crime. The problem was that for the sisters on the block, as well as for most of the parents, grandparents and children, that program was no program at all.

THE VICTIMS

In 1980 alone 21,860 people were murdered in the United States. There were 548,809 robberies, 3,759,193 burglaries and 654,957 cases of assault. Nearly one-third of all the nation's households were touched by crime in some way.

These are some of the "facts" cited by conservatives who declare that we are once again suffering an epidemic of violent crime in America. "The public is well aware that crime has reached alarming proportions in American society," said the Attorney General's Task Force on Violent Crime last summer. Ronald Reagan went further when he told the nation's assembled police chiefs at their annual fall meeting that the criminal "jungle" is "waiting . . . ready to take us over."

Virtually every official report issued in the past 20 years has shown crime spiraling ever higher into the dizzying heights of death and anarchy. The FBI's Uniform Crime Reports showed that serious crime rose by 50.1 percent between 1970 and 1979. One textbook writer calculated the data to show an increase of seven million incidents in property crime between 1960 and 1976. Another claimed that crime has risen by 234 percent. "Crime always seems to be increasing, never going down. Up five percent this year, ten the next, and the commission's surveys have shown that there is a great deal more crime than the statistics show. The public can fairly wonder whether there is ever to be an end." So concluded the famous report of the President's Commission on Law Enforcement and the Administration of Justice in 1969, the most significant report on crime since that issued during the Depression.

Bluntly stated, the charge is simply untrue.

The computation of criminal justice statistics is a craft only slightly more advanced than alchemy. The panic-infused computations normally cited refer to crime reports collected by approximately 12,000 law enforcement agencies (mostly local police departments), which regularly forward their data to the FBI, which in turn issues its annual Uniform Crime Reports. Leaving aside the fact, for example, that almost no black woman 20 years ago would have reported a rape to the police, leaving aside the millions of dollars spent in the same period by federal agencies to advance the collection of crime reports by local police departments, leaving aside the incentive each department has at appropriations time to magnify its own tasks, the Uniform Crime Reports do not measure the *incidence* of crime. They measure the steadily increasing *reports* of crime received by the police. The hapless citizen is thus scared out of his or her wits not by a real crime wave but by a "crime reporting" wave.

According to a recent report from the National Council on Crime and Delinquency (NCCD), there has been very little increase in serious crime in America over the past decade. In an NCCD paper issued last January, authors Jim Galvin and Kenneth Polk demonstrate that crime rates have not always increased during that time: "Data are available which show persuasively that crime has stabilized, rather than increased, in recent years. Victimization data show that crime touched 32 percent of all households in 1975 and a similar percentage in 1979 (31.3 percent; and by 1980, a *decrease* to 30 percent).

"Arrest data, a measure of law enforcement activity, are also an indirect measure of crime, at least of that serious enough for official response. Between 1975 and 1979, total arrests in the United States for Index crimes (major crimes) declined slightly by 2.1 percent. In the same period arrests for violent Index crimes increased less than one percent." Yet despite the stability in arrest rates, the number of full-time law enforcement positions rose by nearly 27,000, or 4.3 percent, during the same time, creating nothing but an immense crime bureaucracy.

The victimization data Galvin and Polk mention are not merely the bloodless constructs of some callow, emaciated sociologists, even if the term sounds like it. They are the result of annual surveys conducted by the Census Bureau for the Justice Department's Bureau of Justice Statistics. Initiated in 1972, the National Crime Survey covers about 135,000 people in households across the nation. It includes rape, robbery, assault, larceny, burglary and car theft. Investigators gather information from victims about themselves, about the incidents and about the offenders; hence the report's annual title: "Criminal Victimization in the United States." For obvious reasons it does not include homicide. A summary of both the FBI's Uniform Crime Reports and the victimization reports during the past decade shows that while the number of police reports of serious crime has risen steadily, the number of victims of crime remains about the same. (See box, opposite page.)

These facts of crime, all collected by the Department of Justice but seldom given much attention in the nation's press, paint a picture of America far different from that depicted by Messrs. Reagan, Burger and Smith, who see the country as besieged by a spreading "reign of terror."

The contrast is still starker when the victimization reports are analyzed further. Take, for example, crimes of violence. The rate of violent attack per 1,000 people in 1973, 1975 and 1979 hovered at 32.3, 32.8 and 34.5, an overall variation of less than seven percent. For those crimes standardly regarded as most serious—robbery and aggravated assault resulting in injury—there was virtually no change in the same three years: 5.4, 5.4 and 5.5 per 1,000. (Most violence results from assaults, often from just fist fights and brawls.) As Eugene Doleschal, information director of NCCD, remarked, "These surveys support the view that criminal behavior remains roughly constant over the years and that 'crime waves' are created by the human imagination."

Murder, however, is not a matter of the imagination, and both the number and the rates of homicides in America are rising. Nationwide, the murder rate rose from 9.6 per

100,000 people in 1975 to 10.2 per 100,000 in 1980. Compared to any other nation in the developed world, and much of the Third World, it is a horrendous figure, the sort of statistic that makes Brits and Danes and Swedes check their life insurance policies before visiting here.

That fear of murder is real can hardly be doubted. Murder is the ultimate crime. Yet whether those who fear murder most have any basis for their fear is another matter. In 1980 the much-praised Figgie Report on Fear of Crime revealed that 17 percent of Americans do fear being slain, even though only ten of every 100,000 people are actually murdered. Victimization data indicate that violent crimes, except murder, are underreported by 66 percent. Of all violent crimes committed, murder constitutes less than six-hundredths of one percent—and even then it is a crime that most often takes place between people who know each other. When it comes to murder, those whom we should fear most are almost never the random muggers of the streets but rather the angry and frustrated members of our own families and the aggravated neighbors in our own communities. That is the situation for Americans at large. But for those at the bottom of our society, for blacks and Hispanics, for those who can only dream of crawling up into Mr. Reagan's safety net, for the Freddy Rileses of this world, there is profound reason to fear death in the city streets.

The record in California offers ample evidence of the real danger at the bottom (see box, page 31). Data drawn from the 1980 report of the California Bureau of Criminal Statistics show that if you are a white Californian, your chances of being murdered have increased somewhat in the past six years. But if you are black, Hispanic or Asian, your odds of being murdered have risen dramatically. Prospects are still worse for the young: slightly more than 62 of every 100,000 black males under the age of 25 were murdered in 1980—nearly four times the state average and more than 15 times the murder rate for young white women. Nationwide, murder is the leading cause of death among young black men.

Ignorant or duplicit, Ronald Reagan and his law-and-order gang have continued to inflame the fears of middle-class white citizens through a profound theft of reality. They speak of the terror that grips respectable citizens who fear to walk the streets; it is a propaganda maneuver that snatches the pain away from the truly terrified members of the underclass and applies it to those Americans who are the most privileged and the safest. Having erected this exaggerated sense of insecurity, they then propose "solutions" that have never worked at any time in the history of America: harsher deterrence, more police and more prisons.

Police and prisons can be effective means of suppressing crime. In the Soviet *gulag* they have maintained a remarkable record. The United States, however, is another story. The same numbers the conservative critics have used to whip up their crime-wave hysteria demonstrate the futility of their program; for in the past ten years we have seen an expansion in both the police and the prison population heretofore unprecedented in this century. Already third in the world in the proportion of citizens it imprisons—ranking only behind the Soviet Union and South Africa—the U.S. has current plans at the state and federal levels that project boosting the prison population to half a million, thereby making us the world leader for incarceration.

For the eight years between 1972 and 1980—during which nonmurderous crime remained relatively stable—the prison population rose by 60 percent, from 196,100 to 316,500. Sending muggers to jail did not reduce the number of muggings in America. Jailing killers—who two times out of three were either friends or family members of their victims—did nothing to hold down the murder rate. But it has and does cost Americans $4 *billion* per year to maintain this growing failure, and it will cost an additional $8 billion to $10 billion to build the new prisons that the hardliners want.

Coughing up more bucks for the boys in blue is no more

THE CRIME WAVE WITHOUT VICTIMS

Crimes reported to the police jumped from 8,098,000 in 1970 to 12,152,700 in 1979, up 50.1 percent.

Arrests for major crime rose regularly until 1974 and then remained at about the same level.

Victim reports of crime stayed fairly constant throughout the period.

Arrests of juveniles have actually dropped steadily after peaking in 1974 and are now lower than they were a decade ago.

promising. Consider the city of Los Angeles, that wondrous dream place of sun-dappled opportunity, where even the movies cannot come up with as many exotic forms of death as reality supplies. The current average murder rate in California is 14.3 people per 100,000; in Los Angeles it's 34.6 and rising. It has been rising for several years, despite regular increases in the budget for the L.A. police department, which has doubled in the past eight years. Additionally, the state reinstituted the death penalty, passed a tough "Use a gun, go to prison" law, launched a major program of jailing juveniles and steadily imprisoned more adults than ever before. Nonetheless, the number of people murdered in Los Angeles doubled between 1972 and 1980. (In New York City, murders increased by about 21 percent during the same period, while the police rolls remained about the same.)

In 1972, an experiment in Kansas City, Missouri, in beefing up patrols produced dismal results. The police identified one high-crime, multiracial district and flooded it with twice and sometimes three times the usual number of officers. After one year they examined the incidence of serious crime. "The overwhelming evidence," the year-end report concluded, "is that increasing routine, preventive patrol within the range tested had no effect on crime."

Still the police delusion proceeds unabated. National spending on police, adjusted for inflation, rose more than 270 percent between 1950 and 1980, nearly twice the growth in total governmental spending. The only discernible trend during that time has been a marked jump in murders and a gradual growth in other crimes. As Lawrence Sherman, research director of the Police Foundation, said last year, "We used to put leeches on sick people to get the blood out. If they didn't get better, you'd put on more leeches. Well, that's the level of discussion about crime."

THE KILLERS

Brooklyn is one of the reasons so many New Yorkers now live in Los Angeles. Once a rolling suburb of green fields and meandering streams, once the first stop en route from the immigrant tenements to Westchester County, Brooklyn is that exhausted, brown city across the East River from Manhattan, where some shoppers have to stand in line before bullet-proof glass windows and ask the storeowners to fill their orders and slide them out through slots. Brooklyn is where a 15-year-old street kid described something of what life at the bottom is all about: "In Brooklyn you fall into one of two categories when you start growing up . . . . First, there's the minority of the minority, the 'ducks,' or suckers. These are the kids who go to school every day. They even want to go to college. Imagine that! School after high school! . . . They're wasting their lives waiting for a dream that won't come true.

"The ducks are usually the ones getting beat up on by the majority group—the 'hard rocks.' It you're a real hard rock you have no worries, no cares. Getting high is as easy as breathing. You just rip off some duck . . . . You don't bother going to school; it's not necessary.

"Hard rocks do what they want to do when they want to do it. When a hard rock goes to prison it builds up his reputation. He develops a bravado that's like a long sad joke. But it's all lies and excuses. It's a hustle to keep ahead of the fact that he's going nowhere."

Judge David L. Bazelon, who is the senior circuit judge of the U.S. Court of Appeals in Washington, D.C., tells that story frequently when he is asked about crime in America. But unlike Warren Burger, who formerly worked with Bazelon on the District of Columbia Circuit, he sees the answer to the crime problem as a much more complicated proposition than simply adding firepower to police arsenals.

"It is no great mystery why some of these people turn to crime," he told a gathering of criminologists last year. "They are born into families struggling to survive, if they have families at all. They are raised in deteriorating, overcrowded housing. They lack adequate nutrition and health care. They are subjected to prejudice and are educated in unresponsive schools. They are denied the sense of order, purpose and self-esteem that makes law-abiding citizens."

It would be easy to presume that Bazelon is one of those "soft" judges currently under attack for loving killers more than their victims. He is not. He insists that citizens be protected from violent crime. But he points out, pragmatically, that since vengeful deterrence has failed miserably, we have no choice except to examine the underlying conditions that produce criminal rage. In the short run and in the long, social justice is inseparable from personal safety.

Jobs, therefore, are the answer to reducing crime, the liberal-left alliance has answered. It is because of record unemployment that crime is up. Like the cops-and-prisons argument, the jobs campaign is intuitively appealing. If he'd had a loaf of bread, Jean Valjean would not have taken the candlesticks. If people are working, they'll have no reason to steal. Unfortunately, progressives today are just as subject to illusion as they were 15 years ago, when they thought a rapist could be transformed into a revolutionary through the purgative of rhetoric. Jobs alone—having them or losing them—do not directly affect crime. If it were so, property crime would rise with unemployment: it did not during the Great Depression (the best estimates are that all criminal activity declined); and, as the victimization studies show, it has not in the minidepressions of the past decade. Even more confounding, crime rose slowly but steadily during the prosperous 1960s. The only crime that has risen rapidly in recent years is murder, and that, we know, generally involves people who know each other, who live in the same communities, who are poor and who exist on the edge of desperation: people like Freddy Riles and Jimmy Bowers, who went down on the same Richmond street.

Leonard Weinglass, the noted criminal defense attorney, cut through the usual nostrums in a speech last year when he called for a systematic program to deal with crime. He, too, brought some anxious fibrillation to the brows of old comrades when he dismissed the liberal jobs-and-crime formulation. He recalled some of the differences between the 1930s and 1980s: "The Depression started in 1929, with the Crash on Wall Street. Persons across the working class and poor saw the rich jump out of buildings. But the perception of the country was that we were all in it together, rich and poor alike were suffering, and so the alienation level in the midst of poverty was low. I submit: it is *alienation* that causes crime, and not poverty.

"In 1980, we have just the reverse. We have the perception, on the part of the poor, that the rich are getting richer by far, and have never had it so well. Orange County, California, has more Rolls Royces than there are in Great Britain. When the Porsche Company in Stuttgart, Germany, announced its sales for 1980, 75 percent of all Porsches sold in the world were sold in Southern California. We have in this community the half-million-dollar condo and the half-million-dollar yacht living side-by-side with some of the worst poverty that exists in any city in the country."

The gap that Weinglass spoke of, the gap between the world of Freddy Riles and the Southern California affluence that so suffuses televised America, is more than the gap of joblessness. It is, in Judge Bazelon's words, the gap of frustration, desperation and rage. It is the same gap that the 15-year-old from Brooklyn speaks of when he says suckers are "waiting for a dream that won't come true."

If there is to be any program to combat crime in America, to eliminate the murderous violence that is brutalizing the underclass and terrorizing the middle class, to defuse the arsenal that sealed the fates of Freddy Riles and Jimmy Bowers and David Short, then surely it will come through confronting the rage that results from a life where the future has no meaning.

Freddy Riles and David Short were men without a future, men for whom deterrence had no meaning, because they had arrived at that point where they had nothing left to lose. "Jail?" Short said one day to investigator Roberta James. "Sister, what do you mean, jail? That's no threat to me. I know I'm going to spend over half my life in jail, regardless of whether it's on your stupid subpoena or anything else." For them, death and apprehension become the focal, climactic instants in a life defined not by what is possible but by all that which is impossible.

Drawing on the work of French philosopher Jean-Paul Sartre, a number of criminologists in Great Britain and America have begun to look at whole populations whose sense of the future is either minimal or nonexistent and for whom crime has become endemic. Paul Takagi, former associate dean of the Criminology School at the University of California at Berkeley, has paid particular attention to that issue. "The problem," he maintains, "is that the future is conceivable only in terms of the field of possibilities that are highly structured by the social, historical reality and tightly circumscribed by material conditions. Thus, an individual becomes aware of his class by means of the future it makes possible for him. For the underprivileged class, the future in terms of social possibilities is almost totally barred, and as a result, as Sartre writes: 'Every man is defined negatively by the sum total of possibles which are imposed for him. For the underprivileged, each cultural, technical and material enrichment of society represents a diminution, an impoverishment . . . of his humanity.'" Takagi is neither a naïf nor a romantic. Some people, he says, must be imprisoned, and probably for a long time for the protection of the rest of us. They are the people who have lost their essential sense of humanity. Yet even the most conservative law-and-order advocates readily acknowledge that prison only further erodes whatever humanity is left in those whose futures are not yet fixed. For that reason alone, if we would find a solution to the threat of criminal violence, it is to our interest as survivors to look toward a vision that sustains rather than diminishes the human impulse, in an effort to construct a social contract rather than a sociopathic battlefield.

THE SURVIVORS

Until recently, there was no greater criminal war zone in America than Detroit. In the national vernacular, Motor City had become Murder City, a murder-a-day metropolis. As one resident, Alice Szawicz, said, "Everyone on our block—absolutely everyone—was robbed one year. Even two policemen." By the late 1960s and early 1970s anyone who could get out of Detroit did. That was when the auto industry was in its prime. Today more than 300,000 people in the Detroit metropolitan area are jobless. The pall of economic doom hangs palpably in the acrid air. Yet in one area, beleaguered Detroit has achieved a success unmatched anywhere else in America. That is in crime, which police report has dropped 30 percent since 1977. More startling is the record in the city's near-east side, where robberies have dropped by 56

—Continued on page 46

IT'S DANGEROUS TO BE BLACK AND POOR

RACE/ETHNIC GROUP	MURDER VICTIMS PER 100,000 1976	 1980	 % INCREASE
All Californians	10.10	14.30	41.58
White	6.85	8.14	18.83
Black	37.93	54.49	43.65
Hispanic	13.08	21.79	66.59
Others	5.32	9.07	70.48

CRIME

CONTINUED FROM PAGE 31

percent, burglaries by 61 percent and rapes by 60 percent.

The Detroit project does involve reorganization of the police—but not into the usual heavily armed "tac squads." Instead, there are some 50 "ministations" located in basements of churches and public halls scattered across the city. The old "STRESS" tactical force, which had fostered bitter antagonism among the majority black population, has actually been disbanded. Probably more important than decentralizing the police force, however, has been the development of block clubs, which have created their own crime prevention programs with the help of the police.

"Neighborhood Watch" is the name of the program, but it differs vitally from the flurry of police-sponsored watch programs that have become popular in many suburbs. Most of those programs include a single meeting run by the police in which neighbors are encouraged to install gates and window locks and to become the eyes and ears of the police by phoning in evidence of crimes they witness. Detroit's Neighborhood Watch is predicated upon the growth of real neighborhood organizations in which at least 50 percent of each block's residents are encouraged to participate. More than 4,000 Neighborhood Watch organizations have been formed. A year-end follow-up study in 1980 found that in an especially rough strip on Detroit's west side, overall crime fell by 65 percent. An analysis of burglaries in the area found that most break-ins involved a home not covered by the Neighborhood Watch.

Block clubs alone do not explain Detroit's success. Along with them has come a wholesale reformation of the city's government, much-changed from the days when President Lyndon Johnson ordered paratroopers into Detroit to quell rioters and the almost all-white police force carried automatic shoot-to-kill orders. As 25-year police veteran Fred Williams explained, "Cops used to just tell the community what was wrong. But the more the police had their way, the more they alienated people." First came the election of Coleman Young, the black mayor who brought blacks into major positions of power. Second came an aggressive black recruitment drive on the police force itself. That, Williams says, made the turnaround possible: "Once the racial make-up of the police force reflected the reality of the population, nearly everybody had a friend or relative in law enforcement. It wasn't 'them' anymore; it was 'us.' "

Wherever community crime prevention programs have had real impact—be it through the Citizens' Local Alliance for a Safer Philadelphia, in West Philadelphia; the famed Guardian Angels in New York; People for Change, in the South Bronx; or Santa Monicans Against Crime, in Southern California—resolution of the inherent alienation in a "them/us" situation has been critical. All that has changed in Detroit and elsewhere is that people who once believed they had no control over their lives or their community seem now to believe that real change is possible.

The same principle has guided an original and exciting project called the Community Boards Program in the neighborhoods on the south side of San Francisco. Initiated in 1977, the community boards have set out to build nothing less than a citywide alternative justice system. Their premise is that most violent crime results from the standard, unresolved conflicts of daily life—the sort of scrap that left Freddy Riles and Jimmy Bowers dead—or from the neighborhood deterioration that plagued Detroit. Their procedure is to set up forums at which boards of community volunteers hear concrete complaints about everything from parking disputes to vandalism, drug activities and harassment. In 1980, out of 320 cases, 115 were resolved either at board hearings or in the process leading up to them; meanwhile, of some 11,000 criminal misdemeanor complaints filed before the municipal court, only 122 resulted in full jury trials.

Like Detroit's Neighborhood Watch, the creation of a parallel judicial system through the formation of community conflict boards promises a radical and frontal challenge to traditional anticrime campaigns. How successful they will be in the long run remains to be seen. And as even radical defense attorney Leonard Weinglass says, there remains the need for society to protect itself by isolating that small percentage of violent criminals who persist in preying upon us. The opportunity for activists, however, is in the creation of programs whose objective is real social justice.

It is hope & the ability to dream that separate the casual murderer from the committed citizen, the victims from the survivors.

One summer day 19 years ago there happened possibly the most dramatic anticrime campaign yet attempted. That day was August 28, 1963, when 300,000 people marched on Washington, D.C., under the leadership of civil rights activists to demand "jobs and freedom." Reporting on the ebullient spirit in Harlem, a *New York Times* writer concluded his account of the day with the following:

"Police cars patrolled Harlem's streets all day, thinking it would be a big day for robberies, with so many Negro residents away from home, for the trip to Washington.

"But in the evening, the desk sergeant of the 26th Precinct reported no robberies or other crime."

On that day in Washington, police reported a 63-percent drop in major crime.

Intrigued by this sudden interruption in daily crime, a group of scholars at the Center for Youth and Community Studies at Howard University had a hunch. If a massive civil rights march could curtail crime by blacks against blacks, then what was the impact of the mass civil rights protest that had been sweeping Southern cities? Had it, as J. Edgar Hoover and Bull Connor claimed, only increased the level of violent crime? Or had the criminals found something else to do? The answers were extraordinary.

"City Z," a large industrial center with a solid black middle class and several black colleges, underwent intense desegregation campaigns, economic boycotts and sit-ins during 1960 and 1961. During the years of heavy protest, assaults by blacks against each other dropped 30 percent—and then promptly reverted to their old levels once the civil rights activity subsided.

"Town X," a rural community of less than 20,000 people, where black unemployment exceeded 30 percent, was the site of a series of demonstrations during the spring and summer of 1962 and 1963, the warm months when crime usually reaches its peak. During the first summer, major crime dropped by 33 percent. The next summer, the time of the most intense protest, it dropped another 36 percent.

Reflecting upon their findings, the Howard University scholars concluded that the civil rights movement had almost certainly reduced crime among black people:

"One might say that for the lower-class Negro, avenues have been closed off by the social structure, so that violent crime against members of his own race is one of the channels of least resistance open to him for the expression of aggression. When he becomes aggressive against segregation, the Negro's sense of personal and group identity is altered; race pride partially replaces self-hatred, and aggression need not be directed so destructively at the self or the community. . . .

"When large-scale, direct-action civil rights activities are launched in a community, the leaders face a Herculean task of community organization. The members of the community must be recruited, trained and organized into a disciplined, nonviolent army. Networks of communication and transportation must be arranged, for large numbers of people must be united behind a single effort. It is the pooling of resources, the setting up and certifying of goals, priorities and methods in a community effort to produce social change that draws neighbors together in an organization whose very existence would tend to discourage crime. . . . A spirit of common concern pervades the community and serves to discourage crime."

Common concern and the struggle for community: these two are the threads that run through successful efforts to reduce violent crime. Even these, however, are born of something else: hope, the hope of people for whom a future seemed possible, for whom there was reason to dream and fight. It is that ability to dream concretely that separates the casual murderer from the committed citizen, that separates the man denied his humanity from the man who asserts his humanity, that separates the community of victims from the community of survivors.

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WASTE NOT, WAIT NOT—A CONSIDERATION OF FEDERAL AND STATE JURISDICTION

*LAWRENCE H. COOKE**

A paradox of our time is legal scarcity amidst plenty. It is consistent with other incongruities such as momentous scientific advances and an apparent dearth of natural resources, shocking rises in violent crime in a society better educated than ever before, and an inflationary spiral during economic recession. The rubber band between demand and supply in almost any field—in the halls of government, in the commercial marketplace, and in the circles of culture—is now stretching in both directions. The recitation of parallels could be almost endless.

I have always considered my Father as the personification of virtue. He was a man of common sense and logic—with his feet always solidly on the ground. A cobbler's son, he earned his way through life and frequently referred to those who lived beyond their means as having a "champagne appetite and a beer income."[1] He frequently recited a jingle that went something like "eat it up, clean it up, sew it up, use it up" and ended with the proverb of "waste not, want not." Having realized the inability of our material cornucopia to send forth an endless supply and the futility of an economy of extravagance, our mentality moves from expectations of profusion to those of moderation to provide even the physical necessities of life. The same course is generally outlined for government, in which programs and appropriations are slashed at random, and the shadows of Propositions 13 and 2 1/2 cast their pall over budgetary councils.[2] For the judiciary in particular, there is an analogous imbalance. A constant avalanche of litigation at the instigation of an endless horde of suitors seriously threatens to engulf every apparatus of justice—the physical facilities, the judicial and nonjudicial personnel, the tested methods and protections, and indeed, the system of justice itself.

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* Chief Judge of the State of New York. This article is adapted from the Eleventh Annual John F. Sonnett Memorial Lecture, delivered by the Chief Judge at the Fordham University School of Law on February 24, 1981.

[1] This is an American variant of "Beggar's person and Emperor's mouth," 2 J. Doolittle, A Vocabulary and Hand-Book of the Chinese Language, Romanized in the Mandarin Dialect 189 (1872), also corrupted to "a beer salary and champagne appetite."

[2] In a newspaper article it is stated that "[f]or the first time since Proposition 2 1/2 was approved in November amid predictions of fiscal chaos, city officials and leaders of the banking and financial community here are talking openly about bankruptcy for the city." Knight, *Boston Prepares to Retrench As Tax Cut Drains Treasury*, N.Y. Times, Feb 16, 1981, § A, at 10, col. 1. The plights of cities such as New York and Cleveland are recalled.

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In June 1980, Chief Justice Warren Burger, in welcoming remarks to the American Law Institute (ALI), stated that "[i]t is surely plain by now that both federal and state courts share the burdens of what has been called 'the litigation explosion.'"[3] He then added that "[s]ome thoughtful observers tell us that this enormous expansion of litigation is a result of the failure of the political processes to meet the peoples' expectations."[4] Eleven years earlier, the ALI made a study of allocation of jurisdiction and reported that "the present inquiry has a special urgency because of the continually expanding workload of the federal courts and the delay of justice resulting therefrom."[5] In the state courts of Minnesota, litigation has doubled in the last ten years, but the number of judges has remained constant.[6] Although the number of dispositions rose because of efforts of the judges, the filing of indictments increased last year by 19.1% in New York City; the statewide increase was 13.3%.[7] Recently, Laurence H. Tribe, Professor of Constitutional Law at Harvard, wryly observed that "[i]f court backlogs grow at their present rate, our children may not be able to bring a lawsuit to a conclusion within their lifetime."[8] President Carter expressed his concern to the Los Angeles County Bar Association over this "interminable delay—especially when delay itself can often mean victory on one side."[9]

In September 1980, Senator Strom Thurmond, now Chairman of the Senate Judiciary Committee, introduced a bill to establish a Federal Jurisdiction Review and Revision Commission.[10] The Commission would study federal and state court jurisdiction, including problems of substantive law, civil and criminal procedure, workload of the courts, and case processing.[11] Senator Thurmond stated that he was introducing the legislation because of his "belief that our legal system is drifting into a posture of blurring the jurisdiction between the State and Federal courts" and that "[i]ncreasing caseloads in the Federal courts reveal a trend which could eventually lead to a total breakdown of traditional federalist principles as we know them."[12] Quoting Chief Justice Burger, he pointed out that in the past decade Congress has enacted no less than seventy new statutes enlarging the jurisdiction of federal courts; many of these statutes expand federal jurisdiction to cover relief already available in state courts.[13]

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[3] Address by Chief Justice Warren E. Burger, American Law Institute (June 10, 1980), *reprinted in* 126 Cong. Rec. S8964, S8965 (daily ed. June 30, 1980) [hereinafter cited as Burger Speech].

[4] *Id.*

[5] ALI, Study of the Division of Jurisdiction Between State and Federal Courts 1 (1969).

[6] Address by Hon. Robert J. Sheran, Chief Justice of the Minnesota Supreme Court, State/Federal Judicial Council Meeting in Brainerd, Minnesota (Aug. 19-21, 1980).

[7] State of N.Y. Office of Court Administration, Press Release (March 18, 1981).

[8] Time, Aug. 20, 1979, at 48, 51.

[9] Address by President Jimmy Carter, Los Angeles County Bar Association, 100th Anniversary Luncheon (May 4, 1978), *reprinted in* 64 A.B.A.J. 840, 842 (1978).

[10] S. 3123, 96th Cong., 2d Sess., 126 Cong. Rec. S12768 (daily ed. Sept. 17, 1980).

[11] *Id.*; *see* 126 Cong. Rec. S12767 (daily ed. Sept. 17, 1980) (remarks of Sen. Thurmond).

Any survey of federal and state court jurisdiction requires an examination of the historical roots of our judicial systems and a recognition of the interrelationship of the federal and state governments. When the delegates to the Constitutional Convention gathered at Philadelphia in 1787, they came from thirteen self-governing and sovereign states. Each state had its own courts, structured with a jurisprudence similar to that of England and flavored by a variety of colonial prescriptions. There was no preexistent federal superstructure or dual pattern of government such as the one that evolved from the men at Philadelphia—"[m]ost of [whom] had been warned before [leaving] home that they had no right to do more than amend the Articles of Confederation."[14]

The face of government changed with the adoption of the Constitution. There emerged the intriguing concept of dual sovereignty, federal and state, as applied to the central federal union and the component states. The system was described as an "indestructible Union, composed of indestructible States."[15] The judicial article of this new Constitution provided for "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish"[16] and specified the cases to which the judicial power extends.[17] Therefore, a federal judicial sytem was erected alongside, or atop, the individual state courts.

Another landmark was reached with the passage of the Judiciary Act of 1789,[18] by which Congress immediately exercised its power to create inferior federal courts. The federal courts are courts of limited jurisdiction, empowered to hear only such cases as are within the judicial power of the United States as defined in the Constitution and entrusted to them by a jurisdictional grant by Congress. In contrast, each state has courts of general jurisdiction, and these courts enjoy a presumption of jurisdiction over a particular controversy that may be overcome only by a strong showing to the contrary. Chief Justice Burger, in reference to the ALI's study of the jurisdiction of state and federal courts,[19] has observed that "[u]narticulated, but implicit, in the Institute's study was that the state courts of this country are the basic instrument of justice under our system, and this, of course, is the heart of what we call federalism."[20]

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[12] 126 Cong. Rec. S12767 (daily ed. Sept. 17, 1980) (remarks of Sen. Thurmond).

[13] *Id.* (quoting Burger Speech, *supra* note 3, at S8965).

[14] 1 D. Perkins & G. Van Deusen, The United States of America: A History 191 (1962).

[15] Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

[16] U.S. Const. art. III, § 1.

[17] *Id.* § 2.

[18] Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Perhaps Senator Thurmond, in his observations on the "blurring" of jurisdiction,[21] determined that the line of demarcation was becoming indistinct. From the tenor of his remarks, it is fair to assume that he, like others, is disturbed by this trend. Others sense a de facto "merging" and attempt to assess the consequences. The perimeters of the expression "merger of state and federal courts" have not been demarked. In the context employed, an "organizational merger" is not suggested, but "merger" seems to imply that more and more the state and federal courts, using similar methods, are plowing over the same ground. In a 1977 address, Professor Dan Meador, then Assistant Attorney General in the Office of Improvements in the Administration of Justice, posed the question: "Are we heading for a merger of federal and state courts?"[22] In intimating bases that might elicit an affirmative response, Professor Meador cited "the opening of the federal trial courts to some business which had always been handled exclusively by the state courts"[23] and a "growing uniformity in the law being applied by both and in the rules of procedures being used."[24] Similarly, a 1979 report to the Conference of Chief Justices from the Task Force on a State Court Improvement Act mentioned "the Federal-State Partnership in the Delivery of Justice."[25]

Awareness of the possibility of merger has not been confined to these comments. Proposed changes in federal diversity jurisdiction have inspired intense differences. State appellate judges have been known to fume as determinations of their highest courts have been invalidated at the hands of a single United States district court judge. Federal judges have occasionally rankled when required to preside over garden-variety tort and contract disputes instead of nationally significant legal issues.

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[19] *See* ALI, *supra* note 5, at 7-8.

[20] Burger, *To Weaken Our State Courts Is To Destroy Federalism*, Judges' J., Spring 1978, at 11, 12.

[21] *See* notes 10-13 *supra* and accompanying text.

[22] Meador, *Are We Heading for a Merger of Federal and State Courts?*, Judges' J., Spring 1978, at 9.

[23] *Id.* at 46.

[24] *Id.* at 47.

[25] *Hearings on S. 2387 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 151 (1979-1980) [hereinafter cited as *Hearings*].

Consideration of whether state-federal judicial merger, viewed by some as gradual but definite, is a reality reveals the dearth of satisfactory empirical data on this subject.[26] Information would be required to determine if merger exists and, as a preface, the notion of merger must be defined to permit the experiential analysis to proceed. If merger were found, a diagnosis could be made to determine whether it is a problem, a blessing, or a mere phenomenon. Designs for judicial or legislative treatment or surgery would follow. In any event, the gathering of information would serve a propitious purpose either in activating the highly motivated or in allaying their fears.

A fairly recent report of a Department of Justice Committee on Revision of the Federal Judicial System broadcast the distress signal that those courts "now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should. . . . [I]t is therefore a crisis for the nation."[27] As for state courts, in the twenty states providing full information for the decade ending in 1976, there was an average caseload increase of 43% in the trial courts of general jurisdiction.[28] In those same states, the average appellate caseload doubled during the same period.[29]

Obviously, this recital does not warrant complacency in approach or inefficiency in operation. More money could provide more courtrooms and more judicial personnel, but solid reliance on this possibility is not warranted in the face of projected cuts in the federal budget of over forty-one billion dollars and sizeable reductions in federal aid to the states.[30] "[T]he 1980s [will be] a decade of limited resources for courts . . . ."[31] Certainly waste can never be justified, and it is submitted that there are certain areas in the jurisdictional allocation between federal and state courts in which savings in time and effort can be accomplished.

The framers of the Constitution drew a design in which the state courts would be the primary guarantors of constitutional rights.[32] By virtue of the federal supremacy clause,[33] state courts were obliged to apply federal law when applicable, but there was little to apply in the early years. For the better part of the first century, the only significant federal incursion into state court affairs was the infrequent review by the United States Supreme Court of determinations by a state's highest judicial body.

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[26] Burger Speech, *supra* note 3, at S8965. *See also* Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 Miami L. Rev. 180 (1980).

[27] U.S. Dep't of Justice, The Needs of the Federal Courts, Report of the Committee on Revision of the Federal Judicial System 1 (1977).

[28] National Center of State Courts, State Court Caseload Statistics: Annual Report, 1976, at 133-38 (1980).

[29] *Id.* at 50-51.

[30] N.Y. Times, Feb. 22, 1981, § 1, at 1, col. 6.

[31] Steelman, *Options for Reducing Civil Volume and Delay: A Review and Analysis for the 1980's*, State Ct. J., Fall 1980, at 9, 10.

[32] *See generally* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

[33] U.S. Const. art. VI, § 2.

The Civil War and the subsequent Reconstruction aroused an intense spirit of nationalism and produced demands for an expansion of federal authority. From this atmosphere came the opening of the federal nisi prius courts to judicial matters previously handled exclusively by the state courts. In the late 1860's, Congress enacted legislation that expanded the category of diversity cases that could be removed to the federal courts[34] and, for the first time, authorized writs of habeas corpus for persons detained by the states.[35] The fourteenth amendment was adopted, imposing upon the states as a matter of federal law the responsibility for ensuring the rights of equal protection and due process. In the succeeding decade, Congress granted to federal trial courts the jurisdiction to entertain suits arising under federal law;[36] Congress also enacted section 1983 of the Civil Rights Act of 1871.[37] The full impact of these measures was realized, not in their infancy, but in more recent years, and because of these measures an enormous flood of cases has poured into the federal trial system. Vast numbers of state criminal cases have been pervasively reviewed and, as a result of *Ex parte Young*,[38] numerous state office holders have been enjoined in the performance of official duties.

The concurrent jurisdiction enjoyed by both systems has long aroused judicial and legislative concern. Proposals to reduce duplications of jurisdiction include sharply limiting the scope of the diversity jurisdiction of federal courts[39] and eliminating the federal question jurisdiction of state courts. The underlying bases of these suggestions have been the obvious merit of jurisdictional clarity and the overriding desire to channel genuinely federal causes to federal courts and genuinely state causes to state courts. Thus far, however, the proclivity of attorneys for a choice of forum, a luxury we can no longer afford, has prevailed over judicial efforts to secure jurisdictional precision.

The most incessant abrader of judicial feelings may be the overturn of the deliberative judgment of the highest court of a state by a single federal trial court judge. The distinguished Chairman of the

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[34] Act of July 27, 1866, ch. 288, 14 Stat. 306 (current version at 28 U.S.C. § 1441 (1976)).

[35] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241(c)(3) (1976)).

[36] Act of March 3, 1875, ch. 137, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (1976)).

[37] Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1976)).

[38] 209 U.S. 123 (1908).

[39] H.R. 2202, 96th Cong., 1st Sess. (1979).

Conference of Chief Justices, Robert J. Sheran, recently voiced the opinion that such overturns not only incur the resentment of the Conference members, but also are not in the interest of the system as a whole.[40] Certain United States magistrates, with the consent of the parties and when authorized by the district court in which he or she serves, may even conduct any or all proceedings in civil matters including habeas corpus and order the entry of judgment in the cases.[41] One proposal has been that all proceedings concerning state criminal cases containing federal issues be routed to the United States Courts of Appeals to avoid federal trial court review.

Once it has been determined that there should be a redistribution of the caseload, the most difficulty will be encountered in isolating those cases that should be diverted from their present situs. The allocation should be based on sound reasoning. Judge Henry Friendly, a member of the United States Court of Appeals for the Second Circuit, would remove from federal forums not only diversity jurisdiction, but also "state prisoner habeas corpus cases, numerous criminal cases, and much federal question litigation such as environmental protection, personal injury actions created by federal statutes, and most section 1983 suits."[42] Although some view these proposals as too drastic, the recommendations emanate from a respected authority and deserve serious consideration. Moreover, it should be noted that there are more than ten times as many general jurisdiction state judges as there are federal district judges,[43] and state courts handle well over 90% of the cases filed in any given year.[44]

If our federal and state court dockets are as heavily laden as reported, and if our systems are being taxed so that prompt and well-considered justice is not being delivered to substantial segments of society as claimed largely because of insufficient judicial personpower and resources—and I do not doubt these premises—then the day has arrived when there must be a survey of the systems and an updated allocation of the jurisdiction between the federal and state courts. This is not the time to tolerate a haphazard pattern of jurisdiction that by its very intricacy breeds litigation with festering procedural nuances. We can ill afford unnecessary duplication of judicial effort. We are haunted by the specter of criminal cases that run the full gamut of state trial and appellate levels only to start anew up the ladder of federal courts and then perhaps somewhere along the line return to the beginning of the obstacle course. The process may take many years.

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[40] Remarks of Hon. Robert J. Sheran, Chief Justice of the Supreme Court of Minnesota, National Center for State Courts and Marshall-Wythe School of Law Seminar on State Courts and Federalism in the 1980's, Williamsburg, Virginia (Jan. 24, 1981).

[41] 28 U.S.C. § 636(c) (Supp. 1979).

[42] Sheran & Isaacman, *State Cases Belong in State Courts*, 12 Creighton L. Rev. 1, 23-24 (1978).

[43] Burger, *supra* note 20, at 12.

[44] *Hearings*, *supra* note 25, at 140.

In 1959, Chief Justice Warren said that "[i]t is essential that we achieve a proper jurisdictional balance between federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism."[45] In his speech to the ALI, Chief Justice Burger raised for consideration the question "whether the time [had] come for a broader reappraisal of the allocation of jurisdiction" than that included in the 1969 ALI report.[46] History furnishes instances of disdain for state judiciaries. For this attitude there is no longer any justification. Recent years have seen extraordinary efforts toward improvement. These include the establishment of the National College for the Judiciary, the institution of state training courses for judges, such as in New York State where yearly training of five days is mandatory for all judges of courts of record, the requirement of minimum qualifications in most states for judges serving in courts with significant responsibilities, the initiation of training in modern management methods provided by the Institute for Court Management, the provision of technical assistance and support programs by the National Center for State Courts, and highly motivated efforts of both the American Judicature Society and the American Bar Association.

People are looking for leadership, but those who seek a different and more efficient utilization of judicial resources should expect reaction ranging from confrontation to "no-holds-barred" opposition. In the words of Arthur T. Vanderbilt, "[m]anifestly judicial reform is no sport for the shortwinded or for lawyers who are afraid of temporary defeat."[47] The responsibility for providing justice must be divided between the federal and state court systems so they might realize their maximum potential by utilizing their full capacity as efficaciously as possible. As American citizens, we live under a government committed "to establish justice," and a malfunction of our judicial apparatus anywhere is reason for the disquiet of all of us. If we allot spheres of jurisdiction in such a way as to avoid overlap and to free judicial components from repetition of effort, then we will not squander our judicial substance, and delay in the delivery of justice will be reduced to a minimum. We can then say, "waste not, wait not."

There is much to be gained from the uniformity and stability generated from a central authority. There is also advantage in dispersed authority that can operate with more accommodation. We can alter our structures, by modernization, by an infusion of capital, and by innovation, but in the end, the ultimate test is whether we have afforded the citizenry a vehicle guided by competent and impartial judges for the prompt and just resolution of their disputes, under prevailing law applicable to all in equal measure.

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[45] Burger, *supra* note 20, at 11 (quoting Address by Chief Justice Earl Warren, American Law Institute (May 1959)).

[46] Burger Speech, *supra* note 3, at S8966.

[47] E. Gerhart, Arthur T. Vanderbilt: The Compleat Counsellor iii (1980).

Crime, Bureaucracy, And Equality

CHRISTIE DAVIES

Crime is one of America's most serious social problems. Crime rates and particularly rates of serious crime, such as homicide, robbery, rape, and other crimes involving violence, have risen to high and unacceptable levels. The gravity of the problem is only underlined by the eagerness with which the small recent easing of crime rates due to the recession and the diminishing proportion of young people in the population has been greeted. Overall, however, American criminologists and crime policy-makers are pessimistic about the possibility of combating crime; their work abounds with dismal phrases such as "nothing works" or "society must learn to live with high crime rates." This pessimism stems from the fact that most policy-makers looking at the question of crime have concentrated their attention exclusively on what has happened in America itself. When American criminologists have looked at Europe, they have in general noted only that crime rates in Europe tend to be much lower than in America but are rising. And they have not been able to draw sensible conclusions from either of these facts. What is needed is a careful, comparative assessment of how crime rates differ between various European countries and how they vary over time. Such an assessment would give those concerned with making American policy new ways of thinking about the causes and cure of crime. Perhaps the best place to look is at Britain, the European country that most resembles America in its legal and political traditions.

During the last fifty years, Britain has changed from being a relatively crime-free society to one in which serious crimes of violence and dishonesty occur on such a scale as to constitute a significant social problem.[1] The situation has been well summed up by Leon Radzinowicz and Joan King: "In 1900, the police of England and Wales recorded under a hundred thousand crimes, less

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[1] The fact that crime does constitute a real problem in Britain and is perceived as such by ordinary people on the basis of their everyday experience is well outlined in: Patricia Morgan, *Delinquent Fantasies* (Temple Smith, London, 1978). See also, Charles Moore, *The Old People of Lambeth*, Salisbury Paper 9, (The Salisbury Group, London, 1982).

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than three for every thousand people. In 1974, it was almost four for every hundred people. That is, over thirteen times as many. And those are indictable offences, not minor infractions."[2] By the beginning of the 1980s, the number of serious offenses recorded by the police was even greater and was of the order of two and a half million offenses (i.e. about five for every hundred people).[3] These figures give a very rough idea of a major and unpleasant social change that has overtaken Great Britain in the course of the twentieth century.

Some of the increase in recorded serious crime may of course be statistical rather than real. People may, for example, be more willing to report crimes to the police than they were in the past—possibly a result of increasingly easier access to telephones. Additionally, the police may have improved their procedures for recording such complaints. As more people take out insurance policies against burglary, so, too, they are more likely to report such crimes to the police because otherwise they cannot claim the insurance money.[4] Explanations of this kind cannot, however, account for more than a tiny fraction of the enormous increase in serious violent and acquisitive crimes known to the police. The recorded increase in personal violence, robbery, burglary, and other serious offenses reflects a very large real increase in the incidence of these crimes.[5] In consequence, the ordinary British citizen is more likely to become the victim of violence or dishonesty than he or she was in the past.

If we are to seek effective policies to halt and reverse the increase in crime that has plagued modern Britain and which is an even greater problem in contemporary America, it will prove helpful and perhaps necessary to try and explain why the increase has taken place. A knowledge of the causes of crime may not, in

[2] Sir Leon Radzinowicz and Joan King, *The Growth of Crime, the International Experience* (Hamish Hamilton, London, 1977), pp. 3–4.

[3] Home Office, "Criminal Statistics England and Wales" 1979 and 1980, *Cmnd. 8376* (HMSO, London, 1980 and 1981). The figures for 1980 are not strictly comparable to those for earlier years, but they give an idea of the order of magnitude of the problem.

[4] "Criminal Statistics England and Wales," 1980, *op. cit.*, p. 28 for a discussion of this problem where it is concluded that "in general changes in recording patterns seem likely to be slow."

[5] Radzinowicz and King, *op. cit.*, pp. 6–7; F. K. McClintock and N. Howard Avison, *Crime in England and Wales* (Heinemann, London, 1968), pp. 22–27; Morgan, pp. 21–23; Moore, *op. cit.*, pp. 6–7. For some interesting indirect evidence: Rob Mawby, *Policing the City* (Saxon House, Farnborough, Hants, U.K., 1979).

itself, enable us to devise a policy for dealing with the problem,[6] but it can demonstrate that certain popular leftist panaceas are irrelevant and unlikely to work, and it can provide a framework within which policies can be discussed and implemented. Any policy-maker, whether British or American, who fails to look at the historical and comparative evidence regarding the growth of crime is likely to come up with policy suggestions that are at best incomplete and unconvincing.

The Decline of Traditional 'Causes' of Crime

The most striking lesson to be learned from Britain's qualitative lurch from a crime-free to a relatively crime-ridden society is that in modern societies criminal behavior, taken as a whole, is *not* rooted in poverty, in bad living conditions, or in social inequality.[7] It is, of course, possible that these factors do act as causes in individual cases, but since they have all markedly declined in Britain during the twentieth century, it is difficult to see how they can be used to explain the steady rise in crime that has taken place. In 1900 or 1930, there was far more poverty, far more slums, far greater social inequality than there is in Britain today; *but there was also far less crime.* Swedish society has experienced an even greater transformation by affluence, welfare, and state enforced egalitarianism than Britain; but Swedish crime rates have also risen remarkably in recent years.[8] Thus, in 1955 only 225,000 offenses against the Swedish penal code were known to the Swedish police, but by 1979, the corresponding figure was nearly 700,000.[9] The implication of this is that policies that aim to reduce crime by improving welfare or living conditions or by promoting greater social and economic equality are unlikely to succeed in contemporary industrial societies. During the current period of economic difficulties that afflicts Britain, western Europe, and the United States alike, these traditional left-wing theories regarding the socio-economic causes of crime and, hence, the appropriate policies to be pursued, may well become fashionable again.[10] But the evidence from Europe's affluent (and not so affluent) recent past is solidly against them.

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[6] I am not as pessimistic as James Q. Wilson about the possibility of sociological or criminological analysis being able to provide policy suggestions that can be implemented. James Q. Wilson, *Thinking About Crime* (Basic Books, New York, 1975), pp. 43–63. His criticism that these disciplines derive "from an intellectual paradigm that draws attention to those features of social life least accessible to policy intervention" (p. 60) is shrewd but too sweeping.

[7] Wilson, *op. cit.*, Marshall B. Clinard, *Cities with Little Crime: The Case of Switzerland* (Cambridge University Press, Cambridge, 1978), p. 155.

[8] Roland Huntford, *The New Totalitarians* (Allen Lane, London, 1975), p. 343; Clinard, *op. cit.*, p. 152.

[9] *Statistik Arsbok for Sverige 1960, 1970, and 1980.* Statistika Centralbyran, Stockholm 1960, 1970, and 1980.

Some different and more positive insights into the relationship between crime and society can be gained by looking at the trend of British crime before 1900 and at the historic changes in the incidence of noncriminal forms of misbehavior such as illegitimacy in Britain and other societies. British rates of recorded crime in the latter part of the nineteenth century *fell* almost as steeply as they have risen in the middle of the twentieth century.[11] When we take into account the steady improvement in the efficiency of Britain's nineteenth-century police forces in recording and dealing with crime of all kinds, it seems probable that the real fall in the incidence of both minor and serious crimes was even more spectacular than that shown by the statistics.[12] Britain in 1900 was not only a much less violent and dishonest society than it is today, but it was also a much less violent and dishonest country than it had been in the middle of the nineteenth century. Indeed, the overall rate of serious offenses recorded by the police in the 1890s was only about 60 percent of what it had been in the 1850s.[13] The successful reduction of previously high levels of crime and violence and the creation of a secure, well-policed society was one of the great achievements of Victorian Britain. It is an achievement which later generations have carelessly thrown away; but, if we can achieve an understanding of the factors that underlay this achievement, there is no fundamental reason why it should not be repeated in Britain or in America.

Crime in Britain seems to have followed a rough U-curve over time with a period of steadily falling crime from 1850 to 1890; a period of relatively low, stable rates of crime from 1890 to about 1935; and since then, a period of rapidly increasing crime rates. A similar U-curve pattern exists, though with slightly different turning points, if we look at other forms of deviant behavior such as illegitimacy or the misuse of narcotics or alcohol. Illegitimacy rates are in a sense an index of the level of female deviant behavior in a society, just as crime (a predominantly male activity) rates are a measure of male deviance. If we exclude the marked fluctuations in the rates of illegitimacy that occurred during the two world wars, the pattern of changes in the incidence of illegitimacy in Britain is rather similar to that of crime. During the latter part of the nineteenth century, illegitimacy rates fell; they then remained at a fairly low level in the early years of the twentieth century; but they rose again sharply in the mid-1950s,[14] despite the widespread availability of reliable methods of contraception and in recent years of free socialized abortion. It is more difficult to trace out a coherent pattern of drug abuse, but in general, the same three stages emerge. The nineteenth century saw much casual consumption of opiates (e.g. laudanum) and a great deal of hard drinking and public drunkenness. There then followed a period of greater private temperance and public sobriety in the last quarter of the century and in the early and middle years of the twentieth century.[15] This was a period in which narcotic addiction was also an extremely rare phenomenon.[16] In recent years, the abuse of alcohol has again become an increasing problem,[17] and since about 1960 there has been a very rapid rise in the number of known addicts to heroin and related drugs.[18]

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[10] A sophisticated version of these views, which is nonetheless entirely circular in its arguments; John E. Conklin, *Robbery and the Criminal Justice System* (J. B. Lippincott, Philadelphia, 1972), pp. 29, 181, 188.

[11] Ted Robert Gurr, et. al., *Rogues, Rebels and Reformers* (Sage, Beverly Hills, 1976), pp. 37-39, 43-45, 60-61; V.A.C. Gatrell and T. B. Hadden, "Criminal statistics and their interpretation" in E. A. Wrigley, ed. *Nineteenth Century Society: Essays in the Use of Quantitative Methods for the Study of Social Data* (Cambridge University Press, Cambridge, 1972), pp. 374-77.

[12] Gatrell and Hadden, *op. cit.*, p. 374.

[13] *Ibid.*, pp. 373-77.

British society appears to have a so-called U-curve incidence of deviant behavior during three distinct stages over the last one hundred and thirty years or so. We may term these three periods: Reforming Britain (the Victorian era); Respectable Britain (the end of the nineteenth century and the early years of the twentieth century); and Permissive Britain (the middle years of the twentieth century down to the present day).

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[14] Peter Laslett, *Family Life and Illicit Love in Earlier Generations* (Cambridge University Press, Cambridge, 1977), pp. 113 and 123, for details of illegitimacy rates and illegitimacy ratios in the relevant periods; see also Shirley Foster Hartley, *Illegitimacy* (University of California Press, Berkeley and Los Angeles, 1975), pp. 39–40.

[15] Gatrell and Hadden, *op. cit.*, p. 370; A. E. Dingle, "Drink and Working Class Living Standards in Britain 1870–1914" in Derek Oddy and Derek Miller, eds., *The Making of the Modern British Diet* (Croom Helm, London, 1975), pp. 118–21, 131; Christie Davies, *Permissive Britain, Social Change in the Sixties and Seventies* (Pitman, London, 1975), p. 166.

[16] Davies, *op. cit.*, 1975, pp. 140–42.

[17] *Ibid.*, p. 166.

[18] *Ibid.*, pp. 150–56.

Reforming Britain

Reforming Britain saw the mastering and reduction of various forms of criminal and deviant behavior. Respectable Britain was a period of orderly stability when the norms of good behavior that had been gradually established by the reformers were on the whole upheld and maintained, albeit with increasing difficulty towards the end of the period. Permissive Britain saw the breakdown of these hard-won norms of respectability, the growth of crimes of violence and dishonesty, and a rise in other forms of deviance such as illegitimacy and the abuse of drugs and alcohol.

This peculiar pattern of long-term changes in the levels of deviant behavior and of crime in particular in recent British social history cannot be easily explained in terms of the fundamental demographic, economic, technological, or political causal variables usually cited. Urbanization and industrialization; the mechanization and automation of work; improvements in longevity and in real living standards; the growth of government power; responsibility and expenditure were all relatively well advanced during the period I have termed Reforming Britain and continued to increase inexorably throughout all three periods. Changes in the age-structure of the population or in levels of economic activity and employment may be used to explain certain short-term fluctuations in crime rates, but they are not able to account for the broad long-run trends outlined. In order to find an explanation for the rise and fall of Respectable Britain, I examine the growth and, more important, the changing nature of bureaucracy in Britain—a social change which directly affected the moral outlook of the British elite and indirectly influenced the degree to which those individuals and groups most likely to commit serious crimes were morally restrained from doing so.

The early nineteenth century in Britain was a period of economic and moral turmoil. Urbanization, industrialization, and increased social and geographical mobility had broken down the traditional local social controls that had held antisocial behavior in check; the result was an increase in crime, illegitimacy, and other symptoms of social disorder. However, the Victorian elite tackled these problems successfully by gradually imbuing all classes with a morality that I have termed moralism.[19] This mo-

[19] *Ibid.*, pp. 3-5, 15-16.

rality, rooted as it was in British Protestant individualism and in the ideas natural to a society whose central economic institution was the free market, had as its central tenet the idea that each individual was morally responsible for his own behavior. The duty of the individual was to behave well, and social morality was a matter of deciding who was morally in the right and who was morally in the wrong, rewarding or protecting the innocent, and restraining or punishing the guilty. For those who believed in moralism, fairness was seen as the distribution of rights and penalties according to the moral worthiness of the parties.[20]

These ideas were diffused throughout society by the operation of its religious and legal institutions and of the marketplace. The way in which the free market could operate so as to inculcate an ethic of personal responsibility, even in the humbler strata of society at this time, has been well described by Bryan Wilson:

> In a more complex social system where even for the least privileged there was a diversity of moral choices and moral stances, a man distinguished himself and marked himself out as a candidate for social mobility by being a moral man. In Britain, for example, it was quite normal in the late nineteenth and early twentieth century for a workman—any sort of workman in the humbler walks of life—to rely not merely on, and perhaps not mainly on, any certification of his technical skills (that day was still to come) but on evidence of his moral worth. He often had, sometimes literally in an envelope in his breast pocket what he called "my character"—a testimonial from some employer that affirmed the man possessed those moral virtues so much prized among nineteenth century workers. Those virtues were, typically: honesty, willingness, industry, conscientiousness, punctuality, sobriety, and a sense of responsibility.[21]

Religion played an equally important role in diffusing these ideas throughout society. "In Methodism and the subsequent Holiness movement and in the general inter-denominational revivalism of the period there was an attempt through evangelical religion to disseminate to new lower social classes a new morality associated certainly with the work ethic but by no means confined to the narrow sphere of work.''[22]

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[20] Christie Davies, "Moralists, causalists, sex, law and morality" in W.H.G. Armytage, R. Chester, and John Peel eds., *Changing Patterns of Sexual Behaviour* (Academic Press, London, 1980), pp. 13–16.

[21] Bryan Wilson, "Morality and the Modern Social System" in Acts, 16th International Conference for the Sociology of Religion, Lausanne 1981, "Religion, Values and Daily Life," (CISR, Paris, 1981), p. 344.

Efficient Police and Compulsory Schooling

The nineteenth century also saw a growth in the size and importance of government agencies in Britain notably with the ''progressive introduction of police forces throughout the country as a result of the legislation of 1829, 1835, 1839 and 1856''[23] and with the provision of universal compulsory education after 1870. In the long run, these changes may be viewed as part of a general growth in the size of the state bureaucratic apparatus that was eventually to undermine the moral achievements of the Victorians. During the nineteenth century, however, the establishment of increasingly efficient police forces and of compulsory schooling almost certainly helped to reduce crime rates. At the very least, the former acted as an effective deterrent to the criminal[24] and the latter as a means of incapacitating potential juvenile delinquents. Both police and schools were probably even more important as moral agents in the society. Their effectiven[illegible] a result of their peculiar combination of local organization and national ethos. The police were organized on a local basis, and the police officer knew his local community, but the responsibility of the police was to uphold a uniform national code of criminal law and not to make too many concessions to local moral eccentricities. Similarly, the new schools were the responsibility of the local authorities and were small enough to act as effective means of social control in the immediate neighborhood from which they drew their children, but the morality with which they sought to inculcate their pupils was the moralism of the wider society. Both schools and police acted as local agents of a national morality, and eventually this national morality prevailed over any local or subcultural excuses that particular groups might previously have advanced as their reason for not living up to it. In consequence, by the end of the nineteenth century, ''The separate criminal districts had more or less disappeared though there remained streets with evil reputations. The great mass of juvenile criminals was no longer to be found and the remaining groups of professional criminals formed it seems a smaller proportion of the population.''[25]

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[22] *Ibid.*, p. 344.

[23] Gatrell and Hadden, *op. cit.*, p. 353.

[24] *Ibid.*, pp. 353–55, 377.

[25] J. J. Tobias, *Crime and Police in England 1700–1900* (Gill and Macmillan, London, 1979), p. 181.

All these changes which went into the creation of Respectable Britain were well summed up by Geoffrey Gorer in the early 1950s—ironically, enough just as the society he described was about to go into rapid moral decline:

> During the nineteenth and the first half of the twentieth centuries, the strict conscience and self-control which had been a feature of a relatively small part of the English population became general throughout nearly the whole of the society, as the present study has indicated. The forces which led to his transformation in character [from "one of the most lawless populations in the world" to "one of the most law-abiding"[26]] are difficult to establish; although religious belief is not nowadays typical of the prosperous working class it is possible that the evangelical missions of John Wesley. . . may have played a significant part in their time, particularly in the industrial Northern regions. So, too, may have done the gradual spread of universal education. On the basis of the evidence available to me, however, I should consider that the most significant factor in the development of a strict conscience and law abiding habits in the majority of urban English men and women was the invention and development of the institution of the modern English police force.[27]

Professor Gorer, in 1955, particularly and repeatedly drew attention to the remarkable degree of self-control over aggression exerted by the citizens of Respectable Britain, particularly when one considers their violent past (and, it might be added in 1982, their violent present). Indeed, it seemed to him to be the "central problem for the understanding of the English character":[28]

> . . . in public life today, the English are certainly among the most peaceful, gentle, courteous and orderly populations that the civilised world has ever seen. But from the psychological point of view this is still the same problem; the control of aggression when it has gone to such remarkable lengths that you hardly ever see a fight in a bar (a not uncommon spectacle in most of the rest of Europe or the USA) when football crowds are as orderly as church meetings. . . this orderliness and gentleness, this absence of overt aggression calls for an

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[26] Geoffrey Gorer, *Exploring English Character* (The Cresset Press, London, 1955), p. 286.

[27] *Ibid.*, p. 294.

[28] *Ibid.*, p. 13.

explanation if the dynamics of English character are to be effectively described.[29]

What is amazing today in an England disturbed by riots and the growth of violent crime, a country whose football crowds are known throughout Europe for their aggressive hooliganism, is that there could have been such a peaceful interlude in Britain's history. The British no longer, like Professor Gorer, ask of their distant past: "What has happened to all this aggression, this violence, this combativeness and mockery?"[30] They know that much of it is gradually seeping back.

Respectable Britain Declines

The decline of Respectable Britain, the eclipse of the era of the law-abiding British, can ultimately be traced to the ever-increasing bureaucratic centralization of British society in the twentieth century and the linked, but independent, rise of a corrosive ethic of socialist egalitarianism. Both these changes undermined the moral fabric of Respectable Britain and eroded its central belief in individual personal responsibility. The bureaucratization of both private and public institutions in Britain has slowly resulted in a change in the moral outlook of the British elite from one of moralism to one of what I have termed causalism.[31] Whereas the aim of the moralist is always to distribute benefits and penalties according to the moral deserts of the people involved in a situation, causalists seek rather to minimize the overall harm and suffering experienced by the various parties regardless of their moral status or past behavior. The moralist seeks justice while the causalist seeks welfare. Causalists are essentially then short-term negative utilitarians who seek always to minimize immediate harm, distress, or suffering in the particular, observable situations with which they are confronted. They tend to consider only the short-term consequences of their decisions and to assume that people's moral attitudes remain unaffected by these decisions.

In some ways the view that I have termed causalism emerges naturally in an increasingly bureaucratic society. Indeed, the causalist mode of tackling moral questions is one that developed originally because it was the most convenient way of governing the relationship between large bureaucratic organizations. Business corporations, government departments, and labor unions are not people; the relationships between them tend to be viewed increasingly as questions of cause and effect and of accountability and liability rather than praise and blame, reward and punishment. The legal relationships between such institutions are almost necessarily causalist in nature. The growth of Lord Devlin's category of quasi-criminal laws is a good example of this:

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[29] *Ibid.*

[30] *Ibid.*, p. 16.

[31] Davies, *op. cit.*, 1975, pp. 3-7, 17-44; Davies, *op. cit.*, 1980, pp. 14, 35-38.

> The distinguishing mark between the criminal and the quasi-criminal lies not in the use of a statutory provision but in the presence or absence of moral content in the statutory provision containing the offence. . . The first distinguishing mark of the quasi-criminal law is that a breach of it does not mean that the offender has done anything morally wrong. The second distinguishing mark is that the law frequently does not care whether it catches the actual offender or not. Owners of goods are frequently made absolutely liable for what happens to the goods while they are under their control even if they are in no way responsible for the interferences; an example is when food is contaminated or adulterated. Likewise, they may be made liable for the acts of their agents even if they have expressly forbidden the acts which caused the offence. This sort of measure can be justified by the argument that it induces persons in charge of an organization to take steps to see that the law is enforced in respect of things under their control.[32]

An essentially similar moral can be drawn from Devlin's description of the law of tort which is clearly based on causalist rather than moralist principles:

> But that is not the way in which the law of tort has grown up nor is it the function it now performs. Normally the relevant question in this branch of the law is not 'Who is to blame?' but 'Who is to pay if things go wrong?'; and the judgement is expressed as a sum fined not as a punishment for blameworthiness but as compensation for damage done. I do not think that a branch of the law whose object is to provide compensation for damage can be used directly to serve a moral purpose. The reason put shortly is that while liability can be made to depend on moral guilt, full compensation for injury done cannot be made to depend on the degree of moral guilt;

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[32] Lord Devlin, *The Enforcement of Morals* (Oxford University Press, Oxford, 1965), p. 28.

guilt depends upon a state of mind but damage done does not.[33]

As this branch of the law has become increasingly important, and as criminal law has come to constitute a shrinking proportion of our total laws, so questions of guilt and innocence have moved to the periphery of our legal and moral thinking.

These tendencies in British law reach back far into the nineteenth century and beyond, but in recent years they have become far more dominant as large impersonal institutions have become more important, and their relationships have become more complex. Members of the rule-making British elite are more and more involved in making, operating, and manipulating rules of this kind to govern and regulate large bureaucratic institutions. In consequence, their thinking on social and economic issues of *all* kinds tends to become less concerned with the moral guilt of individuals and seeing that each man gets his deserts and to move with the causalist regulation of great corporations so as to avoid harm and provide compensation for damage regardless of blameworthiness. Eventually, as I have shown elsewhere,[34] men who spend their time arguing about corporations and bureaucracies in this way come to regard the moral behavior of individuals in similar terms. Causalism comes to involve the application of the ethos of the law regulating bureaucracies to questions of individual morality and moral responsibility.

Moral Rules Neutralized

An elite, whose moral thinking is predominantly causalist rather than moralist, is less able to make confident moral demands on the ordinary citizen. A society that no longer sees the world predominantly in terms of individual responsibility or of reward and blame is less likely to be able to insist on the moral guilt of its delinquents. The delinquent and potentially delinquent members of a society are rarely completely amoral persons; rather they are individuals who accept the moral demands of their society—for example, that violence or theft or vandalism is wrong—but who find reasons to excuse their own failure to live up to these demands. They live in a precariously balanced moral world in which their adherence to moral rules tends to be neutralized[35] by

[33] *Ibid.*, p. 34; see also Emil Durkheim, *The Division of Labour in Society* (Free Press, 1946).

[34] Davies, *op. cit.*, 1975, pp. 207–16; Davies, *op. cit.*, 1980, pp. 38–42.

[35] I have been influenced here by Graham M. Sykes and David Matza, "Techniques of Neutralization: A Theory of Delinquency," *American Sociological Review* vol. 22, no. 6, December 1957, pp. 664–70.

various forms of subjective evasion of personal responsibility: what they have done or are tempted to do is not "really their own fault," is "not really as wrong as it looks," is "no worse than what goes on elsewhere." In a causalist society, such excuses and forms of self-deception are more plausible and more widely accepted, because they echo the moral uncertainties of the elite itself. The enhanced, illicit self-justifications and moral evasions of the delinquent are but a reflection of the doubts about moral responsibility that grow and fester in the minds of those who manage an increasingly bureaucratic society.

The link between bureaucratization, causalism, and delinquency that I have suggested is one that will tend to exist in most industrial societies and probably underlies the current widespread rise in crime, deviance, and delinquency in those societies. However, it does not follow that such a rise is inevitable. Some societies in the free world, notably Japan and Switzerland, have been able to absorb, adapt, and resist bureaucratization in such a way as to avoid the erosion of their moral order. In Japan the incidence of illegitimacy has fallen dramatically in the twentieth century from 8.8 percent of all live births in 1900 to 0.9 percent in 1968.[36] Furthermore "the rate of non-traffic penal code offences known to the (Japanese) police per 100,000 population decreased from 1,756 in 1950 to 1,476 in 1960 to 1,232 in 1970 and to 1,159 in 1980."[37] The case of Switzerland is particularly instructive for in contrast to the rapidly rising incidence of crime and illegitimacy that has characterized Britain and Sweden in the middle years of the twentieth century, the Swiss have, until very recently, not experienced any change in the rates of either of these two indices of social disorganization. The proportion of live births that were illegitimate remained low and practically constant (it varied between 3.2 and 4.8 percents) in Switzerland between 1876 and 1968.[38] This is in marked contrast to the U-curve pattern to be found in the British Isles and Scandinavia. Even more remarkable is Switzerland's freedom from crime: recorded crime rates are very low and show little increase over time.[39] Thus, "as measured by convictions the total Swiss rates for violations of the Swiss criminal code remained almost constant from 1960 to 1971 as [did] offences against property rates. . . . Conviction trend data in five European countries (Switzerland, Belgium, Denmark, Norway, England, and Wales) have shown that Switzerland was the only country with general stability in the conviction rates and even some decreasing."[40] Studies of victimization of the records of insurance companies and of the untroubled-by-crime daily behavior and experience of the ordinary Swiss citizen prove that the Swiss official statistics on crime are, in fact, a reasonably true reflection of a genuinely crime-free society.[41] The key question is: how has respectable Switzerland managed to maintain the kind of crime-free society which the British only achieved for a brief and transient period in their history? The reasons for the success of the Swiss in avoiding crime are similar to those for the earlier success of the British. They are the obverse of the reasons for the current failure of the British (or the Swedes) to deal with crime effectively.

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[36] Hartley, *op. cit.*, pp. 50–51. It should be noted, however, that much of the earlier recorded illegitimacy referred merely to the paternally acknowledged children of established concubines.

[37] Minoru Yokoyama, "How Have Prisons Been Used in Japan," paper presented at the world Congress of the International Sociological Association, Mexico [illegible], August 18, 1982. Minoru Yokoyama, "Delinquency control programs in the community of Japan." *International Journal of Comparative and Applied Justice*. Winter 1981, vol. 5, no. 2, p. 169; Radzinowicz and King, *op. cit.*, p. 7.

[38] See Hartley, *op. cit.*, pp. 39–43.

Switzerland, like the respectable Britain of a past era, owes its freedom from crime to the highly developed sense of individual responsibility of its citizens.[42] The Swiss have been able to preserve this vital first line of defense against crime, because they have avoided the worst aspects of twentieth-century bureaucracy—bureaucratic centralization and bureaucratic egalitarianism. The Swiss sense of personal responsibility is rooted in the high degree of general responsibility that the Swiss citizen has in political and economic affairs. Swiss society is characterized by "Political decentralization of the government. . . particularly at the cantonal and communal levels. At these levels the individual citizen plays an important role in the government, assuming greater responsibility for social and crime control measures."[43] In Sweden (it could equally well be Britain), a Prime Minister can state that "a society has to an increasing extent taken the responsibility of individuals. Social reforms have required that more and more people must communicate with authorities."[44] Following a different road the Swiss have largely given only a limited role to the government. As a result, centralized welfare programs and government controls are more limited in Switzerland and more reliance has been placed on the individual citizen and the work goal orientation among Swiss youth.[45] "The Swiss still believe that except for state and vocational group insurance each person should try to save with the incentive to build up some capital or to have voluntary insurance. Such an approach which emphasizes a strong work ethic and the need for future goals is still being instilled in the Swiss youth."[46]

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[39] See Clinard, *op. cit.*, pp. 34–52.

[40] *Ibid.*, p. 46

[41] *Ibid.*, pp. 61–82.

[42] *Ibid.*, pp. 112–13.

[43] *Ibid.*, p. 150.

[44] Olof Palme quoted in Clinard, *op. cit.*, p. 153.

The Swiss Model

The contrast between the centralized Swedish welfare state and Swiss welfare arrangements also expresses and exaggerates another vital difference between these two societies—their view of equality. The Swiss ideal of equality is essentially one of equality of responsibility, of equality between government and people, something that is remarkably lacking in egalitarian Sweden.

> In Switzerland social security is treated as insurance provided by a company, the citizen seeing himself as a customer and hence the master patronising a service. In Sweden the position is reversed. The citizen has been taught or chosen to believe that he is the servant, humbly suing for favours from his master, the State. It is a kind of serf mentality, constantly imprinted and not only in the sphere of social welfare.[47]

The modern Swede, or the modern Briton, is robbed of his sense of individual responsibility by the over-centralized, over-bureaucratized society in which he lives, a society whose very nature owes much to an egalitarian ideology very different from that of the Swiss. This ideology seeks to use the bureaucratic machinery of the state to compel individuals to be equal to one another—equal not in responsibility but in fortune, attainment, and worthiness. Both the aims of such a socialistic ideology and the means which its proponents have been forced to use are *necessarily* destructive of the ordinary citizen's sense of personal moral responsibility. It is easy to see why the means used have this effect—the equalization of faculties between different geographical areas for its own sake, or for the benefit of particular social classes or ethnic groups who often live in specific relatively homogeneous areas, necessarily involves greater centralization. Attempts to produce greater equality of educational attainment also tend to produce larger schools and larger catchment areas, which simultaneously impair the school's ability to act as a training ground for personal responsibility *and* the local community's sense of responsibility for the school. Moreover, the very idea of achieving equality through social and political regulation is in itself incompatible with the ideal of personal responsibility. Egalitarianism compounds the problem inherent in what I have termed causalism, for ultimately the egalitarian is forced to argue that people should be treated equally regardless of their individual behavior and deserts.

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[45] Clinard, *op. cit.*, p. 153.
[46] *Ibid.*, p. 112.
[47] Huntford, *op. cit.*, p. 186.

Indeed, within the framework of an ideology of distributive justice, individuals rapidly cease to have deserts or personal responsibility at all. For the egalitarian ideologue of this type, a person's position in life is essentially arbitrary and can be subject to egalitarian regulation at will. Ultimately, not merely are the rich and the poor, the lucky and the unlucky, the intelligent and the stupid to be made equal, but also the virtuous and the wicked.

Societies with low levels of crime, such as Switzerland or once Respectable Britain, are, or were, characterized by a strong and widespread sense of personal responsibility which grew out of their highly decentralized political and welfare systems. Therefore, "Communities or cities that wish to prevent crime should encourage greater political decentralization by developing small government units and encouraging citizen responsibility for obedience to the law and crime control."[48] In such societies, effective police forces can be organized which not only deter criminals but also act as a crucial moral influence in the local community.

Since inequality is not a cause of crime, crime rates cannot be reduced by the political pursuit of social equality. Indeed, policies that have aimed at producing equality through political and bureaucratic intervention have been the underlying cause of the rise in crime in Britain and Sweden in recent years. Any society that wishes to reduce crime would be well advised to abandon policies based on bureaucratic egalitarianism, which are ultimately destructive of society's first line of defense against crime—the ordinary citizen's sense of personal moral responsibility.

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[48] Clinard, *op. cit.*, p. 156.

What does this mean in relation to America's crime problem and possible solutions? This study suggests that past policies for dealing with crime in America may have failed because they too have been formulated within a framework of egalitarian and bureaucratic thinking. What is needed is a set of policies drawn up outside that framework of thinking which address the problem of how to create a widespread sense of personal responsibility in America. The Swiss experience suggests that this is not an entirely impossible task.

The
Council of
State
Governments

The Future of Criminal Justice Planning

CRIMINAL JUSTICE

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The Future of Criminal Justice Planning

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Foreword

Passage of the Omnibus Crime Control and Safe Streets Act by the Congress in 1968 soon led to creation of state criminal justice planning agencies. Working relationships between these agencies and the Law Enforcement Assistance Administration, aimed toward intergovernmental cooperation, indicated a strong interest in the concept of centralized planning for the entire criminal justice system.

In order to examine the feasibility of central planning for criminal justice, the States' Criminal Justice Assistance Project of the Council of State Governments undertook an in-depth study and prepared this report. In many quarters there is a desire to bring about sweeping changes in criminal justice through a formal centralized planning process. However, the present report concludes that this is not a feasible concept in most instances. We hope that the findings will be of interest to decisionmakers involved in the criminal justice system.

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Lexington, Kentucky
November 1976

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Advisory/Evaluation Panel

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Judge Walter G. Whitlatch, Juvenile Court Division, Common Pleas Court of Cuyahoga County, Ohio
Dr. Jack D. Foster, *Project Director*

Since the days of the crime commission we have learned a great deal, more than we are prepared to admit. Perhaps we fear to admit it because of a newfound modesty about the foundations of our knowledge, but perhaps also because the implications of that knowledge suggest an unflattering view of man.

James Q. Wilson
Thinking about Crime

Human beings cannot reweave anew the normative fabric of society each morning: institutionalization is both inevitable and necessary.

Amitai Etizioni
The Active Society

Believing that any problem can be solved if only we try hard enough, we do not hesitate to attempt what we do not have the least idea how to do and what may even be impossible in principle. Not recognizing many bounds to what is possible, we are not reconciled to, indeed we do not even perceive, the necessity for choosing among courses of action all of which are unsatisfactory, but some of which are less unsatisfactory than others.

Edward Banfield
"Why Government Cannot Solve the Urban Crisis"

Executive Summary

Much of what we know about criminal justice planning is conditioned by our experience with the planning process established by the Omnibus Crime Control and Safe Streets Act of 1968 and administered by the Law Enforcement Assistance Administration (LEAA). Discussions about criminal justice planning frequently gravitate to a discussion of planning as it has been carried on within this federally supported program. Particularly confusing is the manner in which the characteristics of grant-in-aid administration have been mistaken for traditional public planning within state and local government.

This report is an analysis of the feasibility of planning for the entire criminal justice system by a centralized agency, independent of the LEAA program. Frequent reference is made to existing criminal justice planning agencies, since they are an important part of the effort to deal with crime and to improve law enforcement and the quality of justice. However, the focus of the report is not on these agencies per se but on the issue of establishing some kind of agency with the responsibility to make decisions for the entire criminal justice system within a State.

Beginning with an historic overview of the events leading up to and resulting from the passage of the Omnibus Crime Control Act and followed by a discussion of traditional planning in state government, the report draws several distinctions between grants management and public planning. Basically, grants management is characterized by its responsiveness to congressional mandates and federal agency regulations, ostensibly administered by state officials for the benefit of state and local government. Its legitimacy is predicated upon the control of a large block of funds, earmarked for the reduction or control of a specified social problem, in this instance the control of crime. In contrast, traditional public planning has been a governmental activity characterized by its subordination to state and local officials who are responsible for deciding and implementing public policy and program operation. The involvement of these officials in the grant-in-aid process, both as grants allocators and applicants, understandably gave rise to an illusion that a centralized planning and decisionmaking process for the entire criminal justice system had emerged. The validity of that impression can only be tested when the federal funds have either terminated or have decreased to such an extent that they no longer obscure the issue. Before that time arrives, however, States will be forced to pass legislation providing for existing state criminal justice planning agencies, pursuant to 1976 amendments to the Omnibus Crime Control Act.

The thesis advanced in this report is that there is, in government, a fundamental chain of relationships among planning, decisionmaking, and implementing authority. In other words, for planning strategies to be utilized, they must be circumscribed by the range or scope of authority of the public official for whom such planning is intended. That scope of authority can be measured by the decisionmaker's ability to implement a strategy after its selection. Put in another way, if a public official's power to carry out his decisions is the real measure of his authority, then planning undertaken for his benefit must be circumscribed by what he potentially can accomplish. The major problem with current comprehensive planning efforts is not that comprehensive planning is impossible. Instead, it is the absence of comprehensive decisionmakers with the authority to carry out centrally planned decisions.

In the report, a search of state agencies is undertaken, divided along the lines of the constitutional separation of powers. The purpose of the search is to determine whether there is any natural placement for a centralized criminal justice agency which would permit centrally planned criminal justice decisions to be implemented. The conclusion reached is that such decisions can be effectively made within the executive branch, insofar as it affects the administration of a federal grant-in-aid program. Its particular placement within any office or department does not seem to be critical to its success or failure. On the other hand, there is no place in state government with sufficient legal authority to implement centralized planning decisions within the more generalized context of regular governmental operations. Equally significant, this report suggests that current attempts to institutionalize a centralized approach to criminal justice planning may not only be dysfunctional to the affected agencies, because of their noncriminal justice responsibilities, but may also be socially undesirable, because of the intimate relationship between democratic government and the fragmentation of political authority. Fragmentation is not the problem to overcome — the dysfunctions resulting from fragmentation should be the target.

In the absence of a federal grant-in-aid program which requires the creation and maintenance of a comprehensive, statewide criminal justice planning agency, States would be faced with the task of determining the need for such an agency from an entirely different perspective. The fundamental question would obviously be whether certain desirable objectives could best be met by a centralized agency.

This report adopts the position that, while there are numerous tasks that can be best performed by a single agency having responsibility for a State's criminal justice system, two key considerations should be kept in mind. The first point is that such an agency is not absolutely essential to the operation of a State's criminal justice system. Because of the relative autonomies created in each criminal justice agency, resulting from constitutional separation of powers and home rule, as well as from the American system of multiplicities of elective office, the dispersion of power is too great to force the system to conform to monolithic objectives. Where a State decides not to maintain the type of centralized agency discussed here, there is still a need to support planning activity in each agency making up the system. If the purpose of planning is to improve the quality of decisionmaking by making it more rational, then planning should take place wherever important decisions are going to be made.

The second point is addressed to those States which desire to create and maintain a centralized agency for the purpose of enhancing the operation of those aggregate agencies that comprise the criminal justice system. In creating such an agency, it is advocated that States do so in a way that is compatible with the political and constitutional realities of state and local governmental operations. The major task for the agency would not be to direct the system toward singular goals or even in any rhetorical sense to be responsible for it. Rather, the enabling legislation should ensure that the agency assist state and local criminal justice agencies to achieve their goals through a process of coordination. This process could only be successfully predicated upon a respect for the fragmented authority inherent in the system, and for its implications upon individual agencies' objectives, internal autonomy, and territorial imperatives. This means that only a limited number of any agency's decisions are amenable to a coordinated decisionmaking process. Normally, these situations only occur when a criminal justice agency's resources or legal authority are inadequate to achieve a desired objective. The opportunities for successful coordination will result when the central state agency can recognize these needs and respond to them in ways that benefit all the agencies potentially affected by such decisions. In other words, coordination is essentially an attempt to build linkages between decisionmakers, not to subordinate them to a universal set of overriding objectives.

Coordination can be promoted by the agency responsible for it through the provision of other related and compatible service activities. This would include the ability to offer and supply technical assistance, administration of grant-in-aid programs, supervision of systemwide information systems, data analysis, research, problem identification, and sponsorship of conferences and workshops.

Finally, the location of a state criminal justice coordination process was examined. Three alternatives are suggested and discussed; namely, (1) assign the responsibility to the state agency that has coordinative responsibilities for other functional areas of government; (2) redefine the objectives of the existing state criminal justice planning agency and make it responsible for coordinating criminal justice decisions in the State; or (3) create a new office within one of the State's criminal justice agencies, such as the department of corrections or the office of the Attorney General. Each option has definite advantages and drawbacks. Consequently, no recommendation is offered except to observe that the present organization of state government in a particular State will probably dictate the option to be selected.

Where States decide to institute a centralized coordination process, they should not ignore the ongoing need of state and local criminal justice agencies for their own planning capacity. States should attempt to build a strong capacity for criminal justice planning at all major points in state or local planning, whether the objective is policymaking, program operation, or coordination.

Although the initial objective of this report was limited to examining the issue of centralized planning for criminal justice, it seemed important to deal with one of the issues that invoked so much interest in centralized planning in the first place — the desire to bring order out of the chaotic array of differing policies, overlapping and competitive programs, imbalances in resources, and other organizational dysfunctions that have characterized the American criminal justice system. Clearly, centralized planning is not the appropriate vehicle for dealing with problems of this nature. Coordination rather than planning is a more effective means for achieving this objective. However, coordination is not an alternative to planning. Both are important, interrelated, and desirable if States are to improve law enforcement and criminal justice administration.

1. Historical Context of Criminal Justice Planning

The only thing that prevents planning from being disastrous in government is that it is not usually believed, governments being multi-purpose, multi-objective organizations.

Kenneth Boulding

Whether the results of public planning in America have been regretful, successful, or simply innocuous, a discussion of criminal justice planning must begin with the recognition that planning has been going on in other functional areas of government for many years.

Historically, to the extent that States engaged in planning, they were preoccupied with four basic areas of concern: conservation, management, various forms of areawide or regional development, and some modified forms of state economic development.[1] State planning was designed to aid in decisions affecting construction by state governments themselves, to regulate and assist in local officials' decisions, and to encourage industrial site selections within the States. Contemporaneously, urban planners began to appear and to foster orderly solutions to problems associated with urban growth. Multijurisdictional organizations were created, either in accordance with demographic patterns or with county lines. In a sense, the beginning of comprehensive public planning might be traced to these early origins. Cities and counties banded together to overcome such dysfunctions as duplications in services and conflicts in policy that commonly occur when there is a proliferation and superimposition of governmental entities.

With the Depression of the 1930s, however, state and local governments were burdened with insurmountable economic problems. Both levels of government turned to the federal Administration for support and direction. From the passage of the National Industrial Recovery Act to the present, the federal government not only has increasingly financed state and local governments but, as a concomitant to the financing, has established, to a large extent, state and local priorities.

With greater frequency, federal grant-in-aid programs channeled funds directly into local governments, completely bypassing traditional federalistic relationships between States and the federal government. Whether in welfare, education, transportation, health care, or public safety, a profound deterioration of state responsibility for urban problems occurred. Even where States were given responsibility for administering massive programs of federal grants-in-aid, it was apparent to all concerned that these programs retained their distinctly federal character, with States merely providing the pass-through mechanisms. By the late 1950s, state planning was being carried out by a series of boards and commissions, generally created in response to federal legislation, which predominantly directed their energies toward the achievement of federally established objectives, generally restricted to rural and areawide application. At the same time, urban planning became increasingly legitimized in municipal and county governments, partly in response to opportunities presented through the passage of federal grant-in-aid legislation.

The 1960s marked the beginning of another era in state planning caused by a number of only slightly related factors. As the number of federal grant-in-aid programs expanded, their structural placement in state government became more problematic. Originally operated out of Governors' offices, this arrangement gave way to the creation of state planning offices, state budget agencies, or state departments of community affairs. In addition to legitimizing the presence of massive federal programs within state governments, it also paved the way for renewed state interest in the orderly growth and development of cities.

In the 1960s, federal grant-in-aid programs expanded three and one-half times. Over 80 percent of the grant-in-aid dollars appropriated by Congress was directed either to state governments or to local governments through state agencies. Programs such as HUD 701 planning assistance, economic development assistance, comprehensive health care planning, and community action programs, even though intended for local governments, were channeled through and became the responsibility of state governments.

In addition to strengthening the federalistic character of intergovernmental relations, the categorical grant-in-aid pattern of federal fund allocation dictated increased development of functional, "comprehensive planning" units. Congress and the federal Administration required state governments to create "lead" state agencies to plan for the management of each categorical program and to ensure the integrity of each program's objectives. In response, States began to shift such responsibilities to state agencies having the greatest substantive interest in the specific federal program. The result was a fragmentation of total administrative planning, previously conducted for the benefit of Governors. It was, nevertheless, a functional way for States to meet the increasing federal demand for extensive documentation of needs, proposed solutions, and evaluation.

7

The Beginning of Criminal Justice Planning Agencies

On July 23, 1965, President Lyndon Johnson established the President's Commission on Law Enforcement and Administration of Justice. It was instructed to prepare recommendations for preventing crime and delinquency and for improving law enforcement and the administration of justice.

The commission's report[2], with its over 200 recommendations, rapidly came to be regarded as a primary reference work in the field, and it remained so for the next five or six years. Everything the commission recommended proceeded from their understanding that crime was the problem and the control of crime was the objective. The language of the report painfully disclaimed any notion that crime could be controlled by the criminal justice system, but then went on to recommend various ways to strengthen the system in order to prevent, reduce, and control crime. The commission called for a massive public effort to stop as much crime as possible and to ensure that crime is not abetted because of inadequacies in the criminal justice system. More money, better trained people, improved research, new techniques, more equitable justice, and greater community involvement characterized most of the recommendations.

With respect to planning, the commission recommended that "in every State and every city, an agency, or one or more officials, should be specifically responsible for planning improvements in crime prevention and control and encouraging their implementation."[3] It argued that "the States are in the best position to encourage or require coordination or pooling of activities that is so vitally necessary in metropolitan areas and among rural counties."[4] The commission, however, was careful to talk about the need for coordination, not the need for comprehensive planning: "The police, the courts, the correctional system and the noncriminal agencies of the community must plan their actions against crime jointly if they are to make real headway."[5] Nowhere was there a call for comprehensive planning.

In September 1965 Congress passed the Law Enforcement Assistance Act (P.L. 89-197), in response to President Lyndon Johnson's call earlier that year for a "war upon crime." In retrospect, this act was a stalking-horse for a greatly expanded federal support of state and local criminal justice activities three years later. The Law Enforcement Assistance Act was viewed as a mixed blessing at the time it was enacted. The appropriations were miniscule by 1976 standards. In three years, the Office of Law Enforcement Assistance had awarded less than $19 million.[6] The emphasis was on "innovation," which resulted in the funding of about 100 projects a year, usually to larger and more sophisticated police departments, for research and training activities.[7] In many States and local communities, the total absence of any federal funding between 1965 and 1968 was common. However, the gate had been opened — the federal government was now in the business of assisting state and local governments in their fight against crime. Crime control had been established as a national social priority. In 1966 embryonic state criminal justice planning committees were set up by a number of

Governors in response to the President's suggestion.[8] What remained was for Congress to increase appropriations sufficiently so that the program could have an impact throughout the country.

Early in 1967, the Johnson Administration introduced the Safe Streets and Crime Control Act which was never passed. Instead, after a year of heated debate, Congress passed its own version (the Omnibus Crime Control and Safe Streets Act of 1968) significantly amending the Administration bill. The debates in 1967 and 1968 set the stage for what is known today as the criminal justice planning process.[9] Two highly debated issues germane to this discussion were: (1) the role of States in administering the contemplated program and (2) the kind of local-federal relationship Congress wanted to foster in passing the Omnibus Crime Control Act. While both points were interconnected and implicit in the present understanding of comprehensive planning, there are theoretical and pragmatic distinctions that can be best understood if viewed separately.

In the hearings before the House and Senate Judiciary Subcommittees, the state-role issue was primarily a federalistic discourse, finding the Governors and state government officials generally opposed to the Administration bill. The Administration bill was predicated upon a view that crime control was essentially local in nature (urban) and, therefore, the joint (and somewhat undifferentiated) responsibility of state and local governments.

The Administration bill carefully restricted its application to supporting state and local law enforcement activities in such clearly peripheral areas as planning, training, information systems, research, and development projects, with some limited support for state and local innovative programs.[10] It contemplated that the U.S. Attorney General would make all project funding decisions, similar to the way in which the Law Enforcement Assistance Act was then being administered by the Office of Law Enforcement Assistance. The federal establishment seemed to fear the loss of programmatic control, which turning over grant awarding authority to the States would require, almost as much as it feared the prospect of assuming the enormous burden of supporting the day-to-day cost of state and local criminal justice services (in 1967, nonfederal law enforcement expenditures alone were estimated to run in excess of $3 billion annually).[11]

The Administration bill also called for statewide comprehensive planning but exempted major urban areas from state responsibility. This proved to be a very difficult point for the Administration to defend. The difficulty resulted from a desire to exempt metropolitan police agencies from state control while advancing the merits of statewide planning authority. Attorney General Ramsey Clark's testimony generally centered upon the States' collective lack of expertise and interest in the problems of local law enforcement. Additionally, the total absence of anything resembling a criminal justice planning mechanism at the state level suggested the probability of interminable delays between the time the federal government made the funds available and the time the money would actually surface at the local level. Municipal officials shared this view for these and other reasons, mainly stemming from the more classical territorialities which typically exist between state and local governments.

Yet, it was equally obvious that most rural and suburban areas did not have, and were not likely to develop, criminal justice planning agencies to do the preliminary and ongoing work necessary to satisfy congressional mandates then under consideration. The necessity for equitably providing such services to less populated areas of the country was, in all probability, the strongest argument in favor of statewide "comprehensive planning." However, if some kind of state planning process was wanted, and single state agency responsibility was desirable, then a state criminal justice planning agency (SCJPA) would logically qualify as the oversight agency for all requests for federal funds, whether emanating from state or local governmental agencies.

Amendments to the Administration bill guaranteed a separation of "planning" monies from "action" funds, an allocation formula for state and local governments, and a single statewide planning document to be submitted annually to the federal government. There was to be no significant local-federal relationship, with the exception of categorical grants made to specific localities from special statutory pools of discretionary funds. The Law Enforcement Assistance Administration (LEAA) was mandated to hold the Governors responsible for the proper administration of the block grant program and for any of its shortcomings.

After passage of the Omnibus Crime Control and Safe Streets Act of 1968, state criminal justice planning agencies were created with great speed and, generally, with little regard for anything but meeting LEAA's requirements for fund allocation. Most SCJPAs were created by gubernatorial executive orders and became attached to the Governors' offices. The pattern varied in some jurisdictions, either through the passage of enabling legislation or by the placement of the SCJPAs in larger state departments, usually planning offices or departments of community affairs.[12]

Regional planning units (RPUs) simultaneously emerged in much the same way as did their state counterparts, with some notable exceptions. A typical RPU encompassed several counties and all the communities within them. As such, few of them were attached to the executive office of any particular unit of government except, perhaps, for payroll or fiscal purposes. Where possible, RPUs were made part of preexisting, multicounty associations or councils created to meet other federal program requirements in such areas as land use or transportation.

By late 1970, LEAA had articulated the skeleton of an agency structure consisting of both a planning agency and a supervisory board. Although federal guidelines carefully spelled out the methods of appointment and the size and composition of the supervisory boards (with some latitude allowed for the unavoidable differences among the States), LEAA held the staff of the planning agency responsible for compliance with federal regulations established for the administration of the act, which included the preparation and submission of a comprehensive annual plan. As the federal guidelines evolved, they were addressed to the "state planning agency," which to all intents and purposes became the agency staff rather than the supervisory board of the agency. Everyone, including LEAA, soon came to equate the state planning agency with the professional staff rather than with the supervisory board.

A careful examination of the Omnibus Crime Control Act of 1968 raises a question as to whether Congress intended to create a planning agency, or whether it intended to create a board or commission made up of state and local officials which would compile a comprehensive plan for the use of federal funds to improve law enforcement within the States. The only portion of the act which offers any clue seems to be Section 203(a);

> The *State planning agency* shall be representative of law enforcement agencies of the State and of the units of general local government within the State (emphasis added).

Obviously, this provision contemplates a state planning agency consisting of a representative consortium of decisionmakers that would comprehensively plan for the control of crime and the improvement of law enforcement. A natural assumption would be that all such references were intended to describe the board's activities and not those of the staff. If so, the responsibilities of the state criminal justice planning agency staff do not appear anywhere in the act. If Congress did intend to create a forum through which independent decisionmakers could consent to mutually applicable policies and funding decisions, then the term "state planning agency" was an unfortunate choice of words to describe it. The title of "state coordinating council" might have achieved a far more realistic public impression and would have aptly described what they were expected to do. The mid-sixties faddish use of both "system" and "planning" terminology probably accounted for the stylized nomenclature.

Although Congress has amended the act on three separate occasions, no changes have passed that would amplify its original understanding of a state planning agency.[13] Partially because of a series of working relationships that had grown up between LEAA and the SCJPAs, and partly because of the Nixon Administration's articulation of New Federalism objectives, state and federal governments were united in their intent to retain the previously created structures for statewide comprehensive criminal justice planning.

The language used by Congress to convey its intent for the act enumerated a number of objectives, all of which related to what euphemistically became known as crime control and system improvement.[14] Concurrently, very specific and limited objectives were established for the state planning agencies which only impacted indirectly on the stated purposes of the act. The SCJPAs were to:

> (1) develop, in accordance with part C, a comprehensive statewide plan for the improvement of law enforcement throughout the State;
>
> (2) define, develop and correlate programs and projects for the State and the units of general local government in the State or combinations of States or units for improvement in law enforcement; and

(3) establish priorities for the improvement in law enforcement throughout the State.[15]

The three objectives stated in the act were appropriate to the activities which could be performed by agencies charged with comprehensive planning for criminal justice. While the state criminal justice planning agency is required to "develop. . . a comprehensive state-wide plan for the improvement of law enforcement throughout the State," Congress neither required the SCJPA to plan for the operation of law enforcement throughout the State, nor did it mandate that the SCJPA do the planning contained in the comprehensive plan. All that was required was for the SCJPA to put together a document, which could be prepared in a variety of ways, that described the projects to be funded, in accordance with established priorities. In any case, Congress expected criminal justice planning agencies to plan for the utilization of federal funds in ways that would promote change and innovation.[16] Consequently, the LEAA-funded planning agencies, through their use of federal dollars, have tried to promote as well as plan for changes in the criminal justice process. Planning, when viewed in this manner, was not perceived as an aid to decisionmaking; it was seen as a political instrument through which certain changes were to be induced or promoted.

Purpose of This Report

Although the federally funded state criminal justice planning agencies have generally had a positive impact upon the whole system of criminal justice, they have had only tangential roles in planning for state and local criminal justice policy, program, and resource allocation decisions. Strong interest remains in the concept of a centralized state-level planning agency with broad planning responsibility for all criminal justice policies, programs, and resource allocations within a State.[17]

The intent of this report is to clarify the issues that should be addressed by a State when considering its role in improving the quality of policy, program, and resource allocation decisions for its entire criminal justice system apart from a federal grant-in-aid program. This report will necessarily make frequent reference to the existing criminal justice planning agencies, since they are an important part of the effort to deal with crime and to effectively improve law enforcement and the quality of justice. However, it must be clearly understood that the focus of the report is not on these agencies per se, but on the issue of establishing some kind of agency (or changing an existing agency) with responsibility to make planning decisions for the entire criminal justice system within a State.

2. The Feasibility of Centralized Planning for Criminal Justice

> For centrally planned change to exist, it is not necessary that the central agency be able to select any set of ends without reference to the resources of the community or its developmental tendencies. But it is necessary, it seems to me, first, that whatever ends are selected represent a course of action that, under the circumstances, can be carried into effect, and, second, that the selection of ends is made "on their merits" (subject perhaps to the directives of a higher body that is formally endowed with the authority—the legal right—to set general rules), but not as an accommodation to demands from other sources that the agency lacks the means or the will to resist. If the former is absent (i.e., if the agency cannot carry the plan into effect), then it is not change; if the latter is absent (i.e., if the agency cannot select the ends to be served), then the change is not centrally planned.
>
> James Q. Wilson
> *Centrally Planned Change*

Much of what we know about criminal justice planning is conditioned by our experience with the planning process established by the Omnibus Crime Control Act and administered by the Law Enforcement Assistance Administration (LEAA). Therefore, discussions about criminal justice planning frequently gravitate to a discussion of planning as it has been carried on by these federally supported criminal justice planning agencies. There are substantial differences between planning as an activity designed to assist public officials in the discharge of their official responsibilities, and planning for the effective administration of a grant-in-aid program. Failure to recognize this difference often confuses the dialogue about criminal justice planning. More important, it can obscure the realities of planning activity, which must relate to the ongoing decisionmaking processes of government at any level.

Public Planning and Decisionmaking

Although planning has now been generally accepted as a legitimate activity for government, with centralized planning increasingly advocated, the fact remains that few people in government have avoided the current confusion over its purpose. That is to say, while many governmental people are busily planning, few understand whether their efforts help or hinder government in the achievement of its objectives, or whether their specific tasks are even consistent with the role which planners should play.[18] The confusion is understandable, given the introduction of the grants management phenomenon into the stream of public planning in America.

Planning activities usually have been described as involving rational choice, anticipating future events and their impact, investigating alternatives, designing solutions, and evaluating their effect.[19] The purpose of all these activities in the public sector is to see that public goals are pursued through courses of action that are based upon a realistic assessment of available alternatives. Thus, at a minimum, *public planning can be defined as the development of a strategy or strategies by government, including an evaluation of the impact of future events, for the accomplishment of specific objectives through governmental action.* The strategies may be grandiose or very modest, the objectives may be vague or precisely defined, and the time frames may include decades or a few weeks. The scale or detail is not what distinguishes planning. Purely and simply, public planning is nothing more than the development of strategies to be used by those officials in government having the power and responsibility to decide a proper course of action.[20] The definition intentionally strips away related activities, such as research and evaluation; separates the process from what many planners do for a living; and seeks to identify planning integrally, independent of such activities as decisionmaking and implementation.

Public planning, as conceptualized in this report, is not a process of making policy or of selecting strategies for change. As indicated, it is the development of strategies to be used by those officials in government having the power and responsibility to decide a proper course of action. The design of a criminal justice planning process must first be sensitive to integrating decisionmaking and planning so that each is relevant to the other. It must also take account of the constraints posed by the current decisionmaking structure of state and local governments. Much of the confusion over what centralized planning can accomplish derives from a misconception of the dynamics of planning and decisionmaking. Planning and decisionmaking are distinguishable activities involving different perspectives. The development of alternative strategies is planning; the selection of the strategy and the allocation of appropriate resources to carry it out is decisionmaking. The two activities operate within different constraints and priorities which are frequently in conflict. Planning assumes the desired objectives have been established and the remaining problem is to identify appropriate means. Decisionmaking, by contrast, is concerned with selecting the desired objectives as well as the means for accomplishing them.

This is not to argue that planning and decisionmaking can never be successfully carried on by the same individual. For example, planners sometimes become surrogate decisionmakers by virtue of the fact that they have generated the information upon which particular policy, program, or resource allocation decisions are made. Then, too, an administrator is frequently able to draw from his own experiences and professional training the necessary information to identify the alternative strategies and assess their probable impact, as well as make the choice among them. However, the merging of roles is likely to be successful only when the issue area is relatively narrow or the circumstances do not require an immediate decision. If these conditions are not present, it is difficult for one individual or staff to satisfy the requirements of each activity equally well. The temptation will be for the decisionmaker to truncate his search for alternatives under the pressure of multiple demands on his time and energies, or for the planner to ignore deadlines and political implications in order to exhaust all potential avenues of inquiry.

Separating planning from decisionmaking has important implications for the design of a planning process and the kinds of plans which are likely to emerge. The strategies must reflect the priorities and concerns of the intended audience if they are to have some chance of implementation. Without that sensitivity, there is a high risk of producing plans which decorate library shelves rather than inform public policy. That is, strategies will be implemented only if there are decisionmakers who, singly or in combination, have the resources necessary for implementation and the incentives to adopt the strategies as their own.

While it is possible to develop comprehensive strategies for criminal justice reform, it is painfully evident that such strategies will be difficult to implement unless there is a centralized administration or political authority that can implement them. The central issue then is really whether States should attempt to centrally plan for criminal justice if there is no single administrative or political structure with authority to implement comprehensive changes in criminal justice policy, programs, or resources.

The purpose of this report, as mentioned, is to assess the efficacy of centralized planning for all criminal justice policies, programs, and resource allocations within a State, independent of the current LEAA program generated through state criminal justice planning agencies. In the last analysis, the centralized planning issue does not turn on the ability to develop comprehensive strategies but rather on making planning relevant to decisionmakers. A prerequisite to the successful design of a centralized planning process for criminal justice is the juxtaposition of planning with a decisionmaker who has authority over the entire network of criminal justice agencies within a State. Without that essential ingredient, centralized planning would of necessity have to be conducted separately from decisionmaking. Notwithstanding the technical or conceptual benefits to be derived from the development of comprehensive strategies, centralized planning for criminal justice under such circumstances is not likely to be an effective instrument for assisting and enhancing public policy decisions.

Locating Centralized Criminal Justice Decisionmaking

Is there any state official, or group of state officials, with sufficient decisionmaking authority and power to implement comprehensive, across-the-board strategies for criminal justice policies, programs, and resources? An answer to this question must come from an assessment of the institutions of state government—the Legislature, the Governor, and the courts—to determine if the balance of power relationships in American government precludes the existence of centralized decisionmaking for the entire criminal justice process to which centralized planning could relate.

In the Legislature

In many ways, Legislatures have a broader perspective of criminal justice than either of the other two branches of state government. Bills passed by them can and do affect the entire range of public issues on crime and criminals. Legislation can impose minimum training requirements for police; establish state inspection of local jails; mandate specific sentencing for various offenses; create new programs and consolidate old ones; raise or lower the age of majority; and, in a very real sense, affect the priorities and budgets of local governments. In short, legislators can create any proposed public policy which has an effect upon achieving the objectives of the criminal justice system.

The policymaking function which Legislatures perform must be considered as both necessary and legitimate. It can only be properly carried out by informed legislators who are knowledgeable about and sensitive to the problems of crime and justice. Within the legislative branch, the passage of legislation constitutes an implementation of selected policies, a decisionmaking process that should be as rational as possible. The recent dramatic increase in number and quality of legislative staffs would seem to provide an organizational base upon which to build a planning process for legislative policy development.[21] As legislative service staff members have been assigned to the committees concerned with criminal justice, a sound, visible, and year-round planning capability has emerged.

In other ways, the capacity of the legislative branch to effect change is quite confined. While Legislatures broadly define and select the policies to be pursued by government, they have virtually no power or organizational structure that would ensure implementation of these policies in the manner intended. The interpretations of administrators, chief executives, and even jurists may produce programmatic results quite different from those articulated within the enabling legislation. The executive branch possesses the primary institutional authority and capability to implement public policy.

In the Courts

The character of the judicial branch makes it the least likely location for comprehensive, systemwide decisionmaking in criminal justice. Because of the separation of powers doctrine, coupled with a defendant's constitutional right to an impartial trier of the facts, no legal foundation can be laid for the courts to assume the decisionmaking responsibility for those agencies charged with either the enforcement of laws or the processing of offenders. Courts must be sufficiently removed from the operation of government to not only guarantee to a defendant an impartial trier of the facts, but to oversee the other branches of government as well. Without the presence of impartial courts to ensure the constitutional propriety of public policy and its implementation, the due process guarantees circumscribing the enforcement of laws and the processing of criminal offenders have no meaning. This higher social need for impartial courts disqualifies the judicial branch as a prospective home for comprehensive, systemwide decisionmaking in criminal justice.

An impediment of lesser magnitude is the responsive quality of the judicial process. Courts do not initiate cases; neither do they concern themselves with criminals who are not processed at least to the point of court appearance. Courts only have the power to order the executive branch or, more particularly, the administrator of an executive agency to conform to their orders arising from cases properly before them. Consequently, courts may have both the power to create public policy and to implement their decisions. Yet, such power can only be realistically viewed within the scope of those cases brought to the court's attention. So, while the power of the judiciary is immense, its narrow applicability reduces its effect to a relatively small number of unrelated circumstances. The implementation of broad-based criminal justice strategies could hardly be systematically implemented by an agency with such limited opportunity to effect change.

In the Executive Branch

Theoretically, at least, the only remaining location for a centralized decisionmaking agency must be found within the executive branch. Governors and their counterparts in local government command the machinery used to implement policy and programs. In addition, they possess broad authority to enunciate public policy. Generally, these chief executives can unilaterally decide upon courses of action and, through their budgetary and political control, are able to maximize bureaucratic conformity to the chosen strategies. The prestige of their offices can be used to encourage adoption of innovations even at those levels of government over which they have no direct control.[22] All of these factors would seem to make the executive branch, and particularly the chief executive's office, a very appealing location for a centralized decisionmaking unit.

In 41 States, state criminal justice planning agencies are organizationally attached to the offices of their Governors.[23] However, in virtually all the States within this category, SCJPAs are physically housed somewhere other than within the Governors' offices. In the early years of the Omnibus Crime Control Act implementation, LEAA encouraged Governors to establish SCJPAs as parts of their executive offices, in the hope that such placement would result in rapid, visible, and effective improvements in crime control and system improvement.

Presumably, Governors would assure themselves that comprehensive planning efforts would be implemented without being hindered by the normal bureaucratic obstacles.

The broad policy responsibilities of a Governor may encourage a comprehensive approach to problem-solving, but such breadth also dilutes the attention which any program is likely to receive. Economic growth, education, welfare, environmental protection, and many other problems typical to government demand a Governor's attention, usually dictated by crises or by their visibilities as public issues. Parenthetically, it might be pointed out that most criminal justice issues that command a Governor's attention are more politically damaging than they are beneficial. Prison conditions and crime rates are not normally subjects upon which incumbents seek reelection. To the extent that criminal justice issues have been positively relevant within the political arena, they have followed predictable patterns of departmental reorganization; program innovations, such as drug control and citizen involvement; or bond issues for correctional improvement.

More to the point are the natural limits of a Governor's authority. In the first place, state constitutions generally follow the federal model, separating powers between branches of government.[24] The result is that both the policymaking and appropriation powers of the Legislature and the power to coerce policy and program changes by the judiciary represent formidable bases of authority which are totally independent of the chief executive. In many States, Attorneys General are separately elected officials, not serving as part of the Governor's cabinet.[25] The inevitable conflict of philosophies and decisions dramatically exposes the fact that although a Governor's position in the hierarchy is both unique and apparently at the apex, no Governor possesses either the authority or the responsibility for the operation of a State's criminal justice system.

The second point is equally devastating to the public impression of a Governor as an omnipotent executive. Over the past century, but especially in the last 30 to 40 years, state and local governments have grown at an incredible rate, to a point where it is no longer an exaggeration to speak of bureaucracy as a fourth branch of government. "Government" possesses an inertia that guarantees a relatively stable level of services to the public, irrespective of elections, changes in philosophy, or natural disasters. Obviously, Governors can penetrate the bureaucracy and successfully cause change to occur; but rarely will Governors be able to dramatically affect more than two or three major programs during a single term of office. In general, they exert their leadership most effectively by carefully selecting their cabinet officers, by agreeing or refusing to introduce legislation, and by deciding to budgetarily favor one program to the detriment of another. Even then, as new cabinet officers become identified with the needs of their departments, a noticeable drift takes place. They fight for new resources and resist all external pressures in their attempts to improve departmental operations. More likely than not, a comprehensive criminal justice planning unit attached to the Governor's office will be more successful in responding to state agency requests for funds than it will be in determining the direction those agencies will take.

When viewing state-local relations, the State's desire for standardization frequently conflicts with a city or county's desire for local autonomy.[26] At the local level, such standards are often only grudgingly accommodated, and then only to the extent that financial inducements are available. Even where statewide standards exist, such as for the recruitment and training of law enforcement personnel, for jails, or for computerized information systems, the autonomy of local criminal justice agencies creates wide ranges in both the quality and the nature of services provided. For Governors and for their planning staffs it means, quite simply, that decisions for major parts of the criminal justice system cannot be made with any assurance of uniform and controlled implementation.

Excluding, then, placement within the Governor's office, several possible sites remain in the search within the executive branch for a home for a centralized decisionmaking agency. The chief executive can assign such function to the budget office, to an agency having general planning responsibility (if there is one), or to a strategically located department having important criminal justice responsibilities. All are within the executive branch, answerable to the Governor. All are closer to the actual operation of the agencies comprising the system. Concomitantly, all are closer to where the great bulk of program decisionmaking takes place. Yet each option lacks something essential in assuring that changes occur in those agencies identified as part of the system. A closer look may reveal what specific deficiencies reduce the likelihood of success at a comprehensive level.

Budget offices have been around for many years. Particularly in States requiring an executive budget submission to the legislative branch, budget offices perform a rather traditional function of gathering, collating, and generally making sense out of the budgets submitted to them by individual governmental agencies. Since there is seldom enough revenue to support all the activities requested, a certain amount of negotiation takes place, generally allowing the affected agency to voice some preference about the inevitable budget reductions. However, a new trend has developed within the past 15 years, brought about by computer technology and the initial popularity of PPBS.[27]

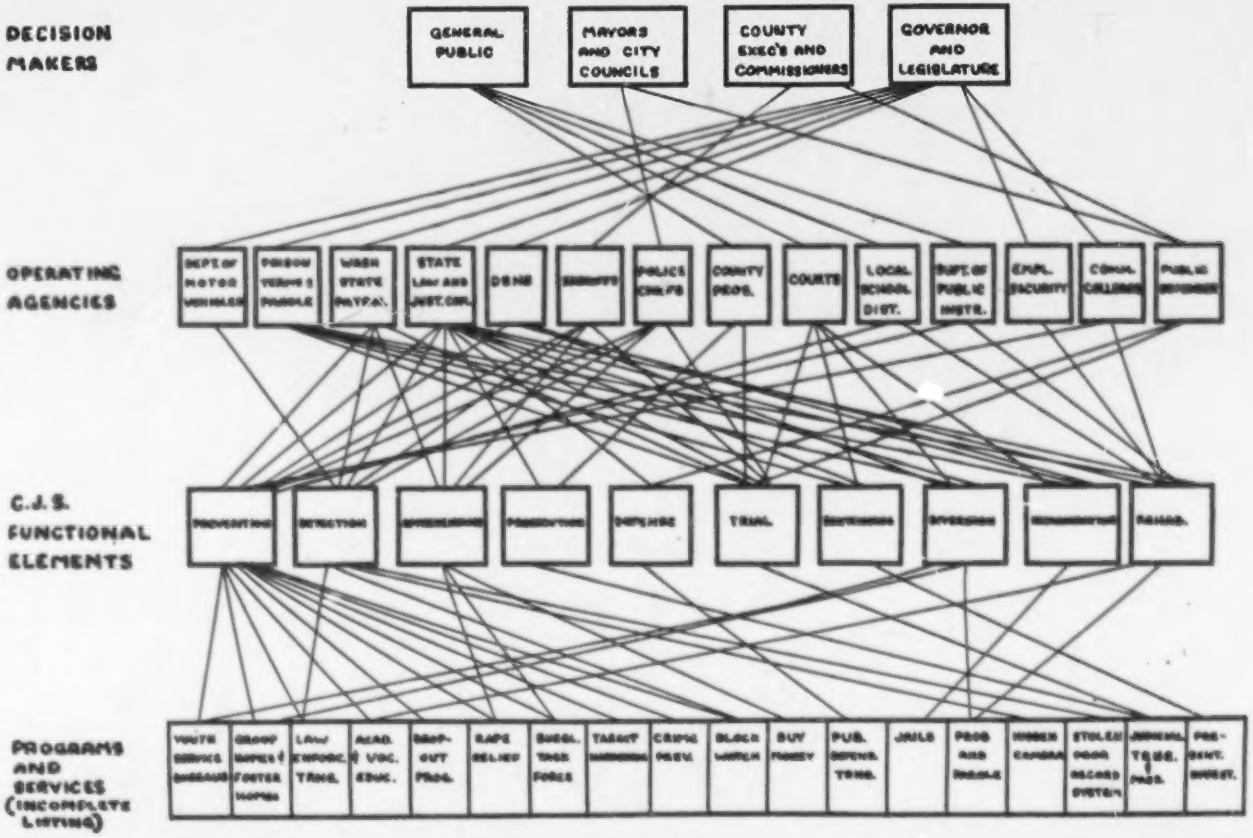
Firmly associated with the earlier state planning efforts to improve public management, PPBS opened up the possibility of linking the short-term budget-cycle planning with longer multicycle planning, thus enabling planners to align both toward long-range governmental objectives. Under this system, the method of planning avoided a problem orientation in favor of one which called for improved management of assets. In linking short-range with long-range planning, the articulation of prioritized objectives was left to the agencies which would carry them out, thus cutting through the traditional conflict between the isolation of centralized planners and the parochialism of agency decisionmakers. Chief executives could much better understand what agencies intended to accomplish and could hold them accountable. In two States, Florida and Michigan, the responsibility for comprehensive criminal justice planning has been vested in the agency charged with the overall state budget responsibility.[28]

On paper it appeared to be an ideal arrangement. In practice, however, a central problem has arisen, in addition to a number of peripheral ones. The central question remains virtually unchanged from pre-PPBS days: Who has the power to decide what programs an agency will operate? The question has not been uniformly resolved by any standard. The critical variables seem to be the management style of the chief executive, the legislation creating the centralized budget agency, and the relative persuasiveness of the two agency directors. In some cases, Governors delegate the authority to alter operating agency priorities to budget agency heads. In other cases, operating agency heads are able to convince the Governor to instruct the budget office to give ground. Often, politically popular programs attract more budget office attention than the operating agency would accord to them. When that occurs, budget office staff seek modifications in the prioritization of programs, while the agency staff seek expansion of their underfunded budget requests. The most accurate generalization that might come out of reviewing such confrontations is that budget offices have disproportionately superior power to refuse funding to operational agencies than they have in planning for the future course of those agencies' activities. This seems to be true despite budget control, despite frequently superior data and perspective, and despite their relationships with the chief executives and Legislatures.[29]

The reverse follows when describing the relative authority retained by heads of operational agencies. While frequently stymied to get funding for new or expanded programs, they maintain high levels of control over the money they do receive. In other words, the budget office/criminal justice planning process can stand as a better example of grants management than as an example of comprehensively planned decisionmaking. Presuming that a centralized criminal justice planning agency were given the power to somehow control the budgets of criminal justice agencies through a review and approval process, they would be in no better position to redirect an agency's activities or to initiate new programs than traditional budget agencies. The point being made is not that such functions are somehow improper or unnecessary; rather, that state budget offices cannot engage in comprehensive, systemic decisionmaking of a proactive nature. Certainly, if budget offices cannot cause the implementation of new or expanded programs, despite their enormous budgetary control, state planning agencies with generalized planning responsibility can expect less success when they are deprived of such budgetary control.

Since centralized state planning agencies are seldom, if ever, empowered to implement comprehensive decisions, comprehensively planned strategies remain largely unimplemented. To the extent that operational agency heads are not persuaded to accept them, centralized planning agencies have the alternatives of appealing to the chief executive, seeking alternative homes for particularly

A Criminal Justice Structure Exemplifying Problems with Coordination


DECISION MAKERS
GENERAL PUBLIC
MAYORS AND CITY COUNCILS
COUNTY EXEC'S AND COMMISSIONERS
GOVERNOR AND LEGISLATURE
OPERATING AGENCIES
DEPT OF MOTOR VEHICLES
PRISON TERMS & PAROLE
WASH STATE PATROL
STATE LAW AND JUST. CMS.
DSHS
SHERIFFS
POLICE CHIEFS
COUNTY PROS.
COURTS
LOCAL SCHOOL DIST.
DEPT. OF PUBLIC INSTR.
EMPL. SECURITY
COMM. COLLEGES
PUBLIC DEFENDER
C.J.S. FUNCTIONAL ELEMENTS
PREVENTION
DETECTION
APPREHENSION
PROSECUTION
DEFENSE
TRIAL
SENTENCING
DIVERSION
INCARCERATION
REHAB.
PROGRAMS AND SERVICES (INCOMPLETE LISTING)
YOUTH SERVICE BUREAUS
GROUP HOMES & FOSTER HOMES
LAW ENFORC. TRNG.
ACAD. & VOC. EDUC.
DROP-OUT PROG.
RAPE RELIEF
BURGL. TASK FORCE
TARGET HARDENING
CRIME PREV.
BLOCK WATCH
BUY MONEY
PUB. DEFENS. TRNG.
JAILS
PROB AND PAROLE
HIDDEN CAMERA
STOLEN PROP. RECORD SYSTEM
JUDICIAL TRNG. & PROS.
PRE-SENT. INVEST.

favored strategies, or shelving the plans until a more opportune moment. The sheriff, administrative judge, legislative committee and, more often than not, the police chief and corrections department director are free to pursue their own objectives, irrespective of the compatibility of such objectives with the comprehensively developed plans of state planning agencies.

A final possibility remains in the executive branch. If effective planning must be related to the authority to implement, and if such authority is normally vested in operational agencies, would it be possible to designate an operational agency as the state criminal justice planning agency? This would present the cognizant department head with both the planning capability and the authority to implement, thus eliminating the fragmentation. Three States have chosen this approach for the LEAA program, primarily States having an umbrella department of public safety or human resources.[30] Because these types of departments generally coalesce the state police, juvenile delinquency, and correctional services, the mass of state criminal justice services is interrelated and responsible to a single cabinet officer.

While the advantages to the cognizant agency are readily apparent in terms of achieving a high degree of integration between the planned program objectives and the agency's activities, the same limitations on the executive functions would still apply. Legislative and judicial decisions would still be beyond the reach of the decisionmaking agency. Any criminal justice function assigned to executive agencies outside of the cognizant department would still present the same territorial conflicts that budget offices or planning agencies would encounter. In fact, such conflicts might be heightened by the relatively equal status of the cognizant department with neither budgetary control nor the relationship to the chief executive characteristic of the previously mentioned models.

The Governing Board Approach

The most common strategy for overcoming the problem of a fragmented decisionmaking structure is to establish a governing board made up of elected and appointed officials from agencies relevant to the issue area, as well as delegates from groups outside of government. This was the strategy adopted by state criminal justice planning agencies mandated by the Omnibus Crime Control Act of 1968 and the various regional planning councils. Such an approach ensures that members of the planning agency will be sensitive to a range of interests. For example, the early advisory boards to SCJPAs were dominated by state and local law enforcement officials. Members of other criminal justice agencies, e.g., judges and correctional officials, charged that their interests were ignored in the planning for disbursement of federal funds.

The weakness of this approach to integrating planning and decisionmaking is that it does not ensure that those who control the resources necessary for implementation will be sensitive to the strategies which are developed. There is a strong probability, in fact, that most decisionmakers are likely to view the planning efforts of the central agency with either indifference or overt hostility.

Part of the problem is communication. In most instances, it is impossible to include all of the relevant decisionmakers on the board, so a representative of a group of decisionmakers must be chosen. However, rarely does he act as a two-way link with a defined constituency. For example, including a legislator ensures the planners will be sensitive to legislative interests, but that does not ensure access to other lawmakers. Similarly, a judge on an advisory board is more likely to view himself as ensuring that the problems of the judiciary are recognized by the staff than serving as a conduit of information from the central planning agency to his fellow jurists. The result may be that most decisionmakers are unaware of the strategies which have been developed, or they become aware of the proposals after the budget for next year has been adopted or contracts for new equipment are already let out.

Faulty communication is only part of the problem. More important, a governing board is unlikely to overcome the jurisdictional jealousies and divergent approaches to public policy which distinguish the branches of government, adult corrections from prosecutors' offices, and separate local units of government from each other and from the State.

Members of each unit of government or each agency have interests and concerns which at times are at odds with their counterparts elsewhere. Sometimes legislators view administrators as self-serving, interested in promoting the programs within their jurisdiction at the expense of alternative problem areas; jurists guard against attacks on the integrity of the judicial decisions by Governors who may be interested in political gains; suburban mayors view their central city counterparts as overbearing with territorial ambitions; chiefs of highly trained police departments regard sheriffs as amateurs who are to be ignored if at all possible; and prosecutors are suspicious of the orientation of correctional administrators and parole boards toward criminals. These conflicts may be petty and unwarranted or they may reflect a genuine difference in the concerns of the officials involved. The mayor of an affluent suburban community is not likely to have the same concerns about criminal justice as the chief executive of a neighboring industrial city, and no amount of conversation at the meeting of a governing board will make those differences disappear.

Although this country has produced many different examples of organizational structure at every level of government, one trait can be found in all of them, namely, the dispersion of power. Perhaps because criminal justice is so fundamental to government's maintenance of social order, the fragmentation is more exquisite than that found in other governmental institutions. In this light, fragmentation may be viewed as a critical mechanism for the constant readjustment of governmental power — a gyroscope for the ship of state. In the zeal to comprehensively implement criminal justice policy and programs, it might do some good to stop and consider whether the pursuit is worth either the effort or the price.

Is Centralized Planning Desirable?

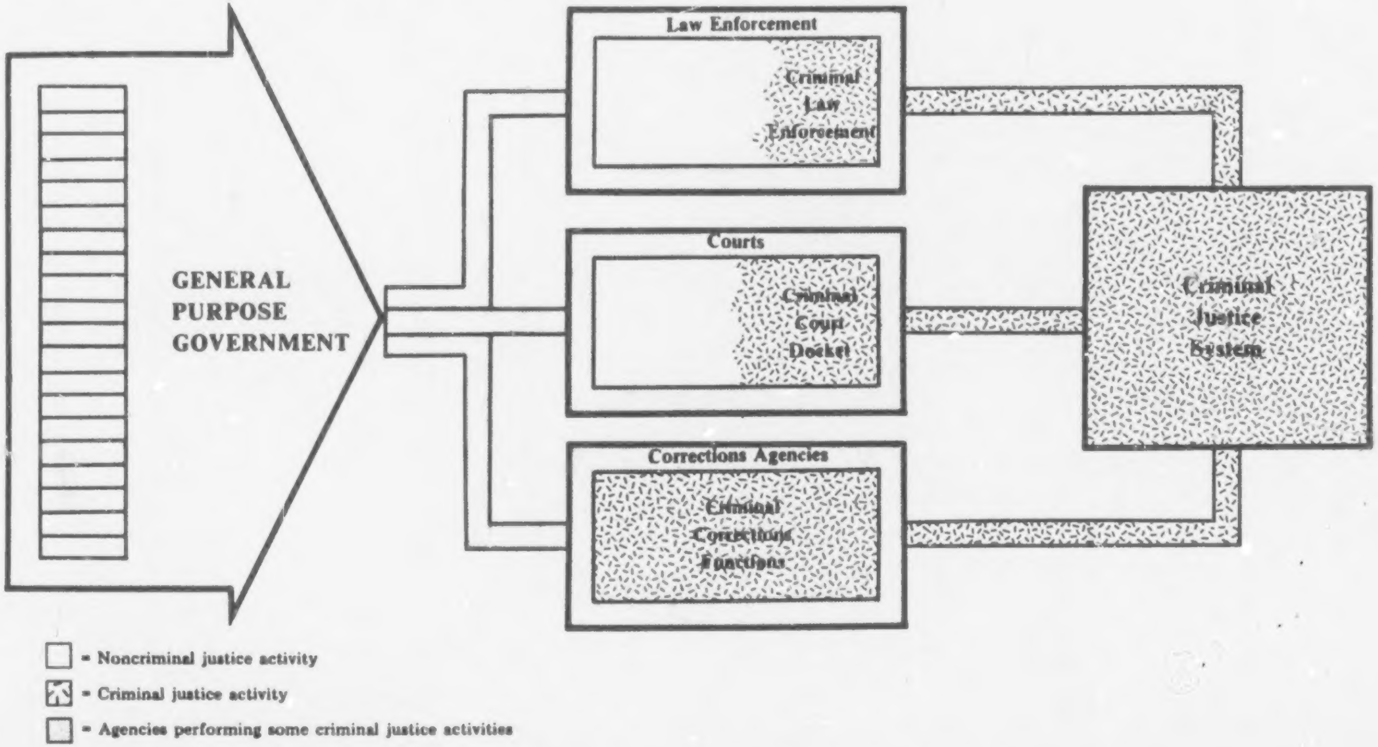
Our only experience with centralized planning for criminal justice has been in planning for the distribution of Omnibus Crime Control Act funds. One of the major features of the LEAA planning process is the fact that the planning agency has centralized decisionmaking authority over the distribution of its block grant funds. Such centralized authority was not created for decisions about policy, programs, and funds for criminal justice agencies in general; rather, the arrangement aimed at bringing together independent decisionmakers who were collectively responsible for operating the criminal justice system to decide how LEAA funds were to be distributed.

As eligible agencies applied for funds, their applications were measured against a backdrop of federal regulations, state priorities, geographical and political factors, and the availability of funds. The boards approved the grants awarded, frequently with special conditions attached, to ensure that the States' priorities would either be promoted or at least would not be violated. In most instances, the board's ability to affect the conduct of the recipient agency was limited to the activities undertaken pursuant to the grants. So while there was a centralized decisionmaking mechanism established in each State, its span of authority was directly limited by its ability to grant funds. The arrangement appeared to work reasonably well as a method for distributing grant-in-aid funds. All of the principal criminal justice system decisionmakers, along with others, jointly decided how the LEAA funds should be spent and, in cases such as statewide radio frequency plans, construction policies, and criminal justice information systems, they also developed binding policies for future use of those monies. However, as a method for developing joint policy for a State's criminal justice system on a centralized basis, the consortium approach proved to be less successful.

Although seldom recognized by those who advocate a centralized approach to planning for criminal justice, centralized planning can be dysfunctional to the agencies affected by the planning. The dysfunction arises from the fact that the agencies which deal with criminal offenders or which might be in a position to influence the occurrence of crime are not uniquely "criminal justice" agencies (see Figure 1). Except for correctional agencies, the traditional criminal justice agencies have considerable responsibility for noncrime-related services. In fact, criminal justice may not even be their most important function or demand the majority of their resources. This is surprisingly true of police agencies, some of which devote as much as 90 percent of their resources to noncrime-related services, such as intervening in family squabbles, improving community relations, investigating accidents, and performing rescue and ambulance operations.[31] The only element criminal justice agencies have in common is the fact that they each have a role to play in apprehending and processing criminal law violators.

Current interest in criminal justice has concentrated so much on the role of police, prosecutors, and judges in the processing of criminal offenders that the

Figure 1
A Perspective of Purely Criminal Justice Activities within Typical Criminal Justice Agencies


GENERAL
PURPOSE
GOVERNMENT
Law Enforcement
Criminal Law Enforcement
Courts
Criminal Court Docket
Corrections Agencies
Criminal Corrections Functions
Criminal Justice System
☐ = Noncriminal justice activity
▨ = Criminal justice activity
☐ = Agencies performing some criminal justice activities

other important roles they play in society have been overlooked. Consequently, planning decisions have been made as though criminal justice was the only, or at least the primary, function of these agencies. The result has sometimes been an improvement in one service function at the cost of another. In some courts, for example, civil case backlogs are now becoming a major problem because of reforms in criminal procedure.[32]

This situation raises serious questions about the wisdom of planning for criminal justice functions apart from, or without regard to, the total responsibilities and services of the agencies that provide the structure for the criminal justice process.

As each agency plans for its own operation, it must necessarily plan for the total range of services for which it is responsible. Policies, programs, and resource allocations must be balanced and internally consistent. Pulling criminal justice activities out of their total agency context can produce distortions of the agencies' operations, particularly when highly categorical "seed" money is available outside the general budgetary process.

If we take a careful look at the types of problems confronting criminal justice agencies, it should become apparent that many do not lend themselves to centralized planning. Consider the following problems, all identified as system deficiencies over the past 10 years by national commissions: the need for improved technology, the need for more effective use of resources, the need for innovative programs, and the need to reduce problems associated with organizational fragmentation. The belief that a centralized planning process is necessary for overcoming all of these problems ignores the fundamental attributes of planning as an endeavor, of the agencies which make up the criminal justice system, and of our system of government.

Everything we know about American government, and especially about the separation of powers doctrine, argues against centralized comprehensive planning and in favor of fragmented functional planning located throughout the various branches and subdivisions of government. *Fragmentation is not the problem to overcome: the dysfunctions resulting from fragmentation should be the target.*

Planning is not inherently more valuable because it is centralized. A public policy on criminal justice planning should (1) place high priority on developing a sound planning capacity at every significant decisionmaking point, and (2) supplement those diffused planning capacities with a mechanism for ameliorating the dysfunctions which fragmented power must inevitably produce.

What does this mean for the design of a state criminal justice planning process? If a process is designed around decision points rather than around the problems to be addressed, what will be the effect on the kinds of plans which are likely to emerge? Does it mean that the comprehensive perspective of planning advocated by so many people must be abandoned entirely, or only take a new form? Is there any significant role for centralized planning? These questions must be answered to complete an understanding of criminal justice planning.

Planning at Strategic Points in Government

If a State elects not to attempt a centralized approach to criminal justice planning, it should ensure that all major criminal justice agencies and units of general purpose government possess an adequate capacity to seriously plan for their own activities. The principal objective of such a policy would be to guarantee parity among public decisionmakers in carrying out their responsibilities. This will not necessarily result in uniform policies, equal levels of service, or automatic minimization of the previously mentioned dysfunctions associated with decentralized decisionmaking. However, it should equalize the ability of each decisionmaker to make an informed contribution to a solution for the problems confronting all of the agencies in the system.

Although a substantial amount of federal money has been invested in building a criminal justice planning capacity in state, regional, and local planning agencies, the bulk of the funds has gone to centralized agencies within the executive branch. The legislative and judicial branches have generally not had an equal capacity to provide planning assistance for their decisionmaking. At a minimum, each of the three branches of state government should have relatively equal planning capability for major policy decisions, recognizing that in the executive branch the planning responsibility may be shared between the office of the Governor and the state criminal justice agencies under the Governor's control.

While attempting to build a planning capacity at the state government level, States should not overlook the possible need to assist local governments in building and sustaining a capacity to plan for that portion of the criminal justice process that is under local jurisdiction. Local law enforcement, judicial, and correctional agencies frequently create more policies, develop more programs, and allocate more resources than do those criminal justice agencies which are part of state government. If state subsidies were extended to support local criminal justice planning activities, the result would be a comparable level of state encouragement for local planning which many States now exhibit toward other local government needs.

A policy of building a criminal justice planning capacity at strategic points in government does not necessarily mean abandonment of a comprehensive perspective. The need for a systemwide perspective seems now to be so well established among planners that the presentation of policy or program strategies without regard to their impact upon other agencies would in all likelihood be regarded as unprofessional. All planners, wherever situated, can take a comprehensive perspective even though they are typically instructed to develop strategies for the attainment of limited objectives.

The existence of a strong planning capacity at different decision points in government will not produce the neat, all-inclusive, well-integrated strategies or plans which many people feel are necessary. Instead, the resulting plans are likely to be episodic, sometimes inconsistent, and more narrowly focused than those developed under the current LEAA program. Yet, this arrangement will more likely result in strategies that will be directly integrated into the decisionmaking processes of government. Obviously, the choice facing a State is whether it prefers to support a planning process that results in comprehensively planned improvements that will not always be implemented, or narrowly planned improvements that will frequently be implemented but may cause problems in other parts of the system. It is not necessary for a State to irrevocably or exclusively choose between them. Given sufficient resources, a State could adopt both options; but whether a State adopts one or both, there should be no illusions about what each approach can accomplish.

There will be times when a State may wish to prepare a "master plan" for criminal justice reform. Such documents are often useful as a means of sensitizing civic leaders and public officials to the needs of the entire State and to possible solutions. However, an objective like this can usually be met through the use of the State's existing planning resources or through the creation of a special task force or commission. In any case, it would hardly justify the creation of a special agency in state government.

3. A Criminal Justice Coordination Process

> The answer to diversity is not uniformity. The answer is unity. We cannot hope to suppress the diversity of our society. Each of the pluralist institutions is needed. Each discharges a necessary economic task. We cannot, as I have tried to show, suppress the autonomy of these institutions. Their task makes them autonomous whether this is admitted by political rhetoric or not. We therefore have to create a focus of unity. This can only be provided by strong and effective government.
>
> Peter Drucker

Throughout this report there has been repeated allusion to the essentially fragmented intergovernmental and intragovernmental nature of the criminal justice system. Fragmentation is manifested in a variety of ways. The most obvious and widespread example is the problem of duplication of services. The proliferation of "dedicated" criminal information computer systems for individual agencies, each with their own policies and procedures for maintenance, access, and expungement, demonstrates the inefficiencies and waste resulting from overlapping activities. Imbalances in funding among criminal justice agencies is another dysfunction promoted by fragmentation. For instance, a local court, for political and financial reasons, may be inadequately funded compared to the police department. A case backlog may result from that court's inability to process offenders expeditiously, which in turn produces other dysfunctional impacts (i.e., overcrowded local jails).

Conflicting or contradictory policies is yet another typical problem associated with diffused agency authority and responsibility. The recent prison overcrowding crisis is evidence of the potential impact of uncoordinated policies emanating from criminal justice agencies. While the thrust of corrections in many States during the last five years has been to deemphasize new prison construction, sentencing policies adopted by various State Legislatures, courts, and parole boards have to a large measure contributed to a spiraling prison population.

Program discontinuities between various criminal justice agencies are a more operational-level problem of fragmentation. One such illustration is court neglect in forwarding relevant information when an inmate is transferred to a correctional institution. Then, too, the use of different radio frequencies by geographically adjoining police departments has often been cited as an example of interagency operational discontinuities.

Centralized planning has been advocated, in part, because of a perceived need to overcome such problems as these. However, centralized planning is not a solution to the dysfunctions created by a fragmented system of government. What is needed in order to deal with fragmented decisionmaking is a method of interfacing the decisions of separate agencies or units of government so that such problems as duplication of services, unequal funding, and discontinuities or conflicts in policies can be minimized. Therefore, along with a program to strengthen the capacity to plan for criminal justice at various decisionmaking points, States may wish to consider establishing a process for coordination of criminal justice policies, programs, and resource allocation. A coordination process is a means of dealing with issues and problems that not only involve but also transcend individual agencies or units of government. It orchestrates the major policy, program, and resource decisions of many decisionmakers so that individual decisions properly interface with each other.

Typically, individual agencies or governmental jurisdictions lack either the initiative, incentives, or the wider perspective to voluntarily coordinate major policy decisions with other agencies or governmental jurisdictions. Even when agencies desire to coordinate their activities, bureaucratic territoriality, program complexity, and lack of clear policy direction often conspire to prevent such informal coordinative efforts.[33] Thus, a third party possessing a broader perspective of the intergovernmental and intragovernmental dimensions of major policy decisions is usually needed to encourage, promote, and induce coordinated decisionmaking for the diverse network of agencies comprising the criminal justice system.*

Necessary Conditions for the Success of a Coordination Process

Coordinating the decisions of two or more decisionmakers is difficult under the best of circumstances. Decisionmakers usually focus their energies on carrying out the policies and programs for which they are singularly responsible. There is generally little incentive for them to look beyond their office for direction or assistance. The more disparate the responsibility, the more difficult the task of coordination. Harold Seidman describes the fundamental limitations on coordination efforts:

> Where conflicts result from clashes in statutory missions or differences in legislative mandates, they cannot be reconciled through

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*Informal cooperative processes are quite often formed through the informational networks developed by skilled bureaucrats or by agency managers or directors who are particularly motivated to correlate their decisions interjurisdictionally. As such, there are numerous examples of interagency cooperation, normally of a bilateral nature, which require no third-party involvement. Such cooperative efforts should not be confused with the nature of or the need for a more formal coordination process.

> the magic of coordination. Too often organic disease is mistakenly diagnosed as a simple case of inadequate coordination.[34]

In general, there is no strong tradition of cooperative decisionmaking between agencies making up the criminal justice system or the governmental units responsible for it. Of course, instances of comradeship exist among the agency heads, prosecutors, defense counsel, judges, policemen, and generally among everyone who has regular contact with each other as criminal defendants pass through the system. However, these close social bonds seldom translate into institutional levels of cooperation.

Despite the formidable problems associated with the criminal justice process, the affected agencies share some common objectives and interests. Without this commonality, of course, there would be nothing upon which a coordination process could be constructed.[35] The challenge to the coordinator is to build upon this linkage to make the organizationally fragmented system function in a way that is less abrasive and more reciprocal. Three dimensions of a situation between decisionmakers seem to capture most of the elements that determine whether or not coordination can take place: authority, dependency, and interaction.[36] To understand these critical dimensions is to understand the potential for, and limitation on, coordinating decisions affecting the criminal justice system.

Authority

At one extreme is the situation in which one decisionmaker is subordinate to another. This may result from a formal hierarchical authority structure as in the relationship between a prison superintendent and the administrator of the department of corrections. At the other end of the continuum is the circumstance in which each decisionmaker has autonomous authority. In between the extremes of subordinate on the one hand, and autonomous on the other, is a range of power relationships. For example, a metropolitan police planning unit, whose policy board is made up of representatives from constituent departments, has some authority over member agencies, but the power lines are tenuous and can be easily broken. In general, one could expect relationships between decisionmakers to fall close to the autonomous end of the continuum when each is part of a separate unit of government, such as a State or county, and at the subordinate end when both are part of a single bureaucracy. When one decisionmaker is subordinate to another, the decisions of one can simply be forced upon another. Coordination becomes increasingly important as the power relationship between the decisionmakers becomes more equal. Neither one is in a situation where he can coerce the other, so they must try to work something out together.

Dependency

Dependency refers to the need that one decisionmaker has for the assistance of another to carry out his responsibilities. A decisionmaker may need the cooperation or assistance of another decisionmaker in order to meet a particular objective or responsibility. At the other end of the continuum is the situation where the decisionmaker has the necessary authority and resources to carry out a particular program or policy. Placement of the situation between decisionmakers along a continuum from self-sufficient to dependent will indicate the degree to which there may be a basis for coordination. Obviously, if a decisionmaker has a strong need for the support of another, it will be easy to encourage cooperative efforts. On the other hand, if a decisionmaker can fulfill his responsibilities with little help from others, there is little incentive for him to coordinate his decisions even if they may have profound impact on others. For example, sentencing practices of courts have a major effect on corrections. However, the inability of prisons to house all of those sentenced to prison does not necessarily influence the sentencing decision of judges.

Dependency is a more subtle concept than authority. Whether decisionmakers perceive themselves to be self-sufficient or dependent is generally determined in terms of their perspectives. Coordination may actually further the objectives of a decisionmaker, but he may fail to see the benefits to be derived from cooperative decisionmaking. The creation of metropolitan radio networks is a good example. Participating departments eventually found that a common communication system helped each of them do a better job. However, recognition of the benefits of a common system did not occur until the networks were made operational through demonstration grants under the LEAA program.

Coordination is a process which must generally build upon a decisionmaker's need for cooperation or assistance from others. In other words, if an agency head wishes to make a decision which affects only the internal operations of his agency, and for which he has adequate authority and resources, there is probably little foundation for getting that decisionmaker to submit his decision to review by others. On the other hand, if that agency head attempts to unilaterally make a decision which either adversely affects other agencies or requires resources which overtax his internal resources, contrary decisions by other agency heads can thwart his ability to proceed with implementation of this particular policy or program. This is an excellent opportunity for coordination.

Interaction

The final dimension focuses on the frequency of exchanges between decisionmakers. Where contact between decisionmakers is high, coordinative efforts are much easier to carry out than when they meet each other irregularly. The interaction continuum is easier to describe than the other two dimensions, but it has no less significance. If contact is frequent, it may be possible to achieve cooperation which will further a goal that transcends those of the agencies involved. For example, if the police and court personnel can be induced to include additional information on the forms accompanying transfers of prisoners, it may increase the effectiveness of correctional services, even though that is not a goal of either the police or the courts. Regular meetings of interagency boards is another strategy for increasing frequency of contact between decisionmakers.

So far in the discussion, each of the three dimensions of decisionmaking relationships has been treated as if each existed in isolation from the other. In practice they must be considered together. The combination of these three dimensions is presented in Figure 2. A review of the patterns provides clues to the variety of circumstances under which coordination can best take place. At the termination of the coordination vector all conditions are favorable for coordinative efforts. There is mutual need, interaction is high, and the organizations are bound together in a hierarchical relationship. At the origin of the vector the conditions are not favorable for coordination since each agency has its own resources, contact is infrequent if at all, and each is independent of the other. Points along the vector characterize intermediate degrees of coordination, beginning with zero, where conditions inhibit coordination, to the extreme point, where conditions encourage coordination.

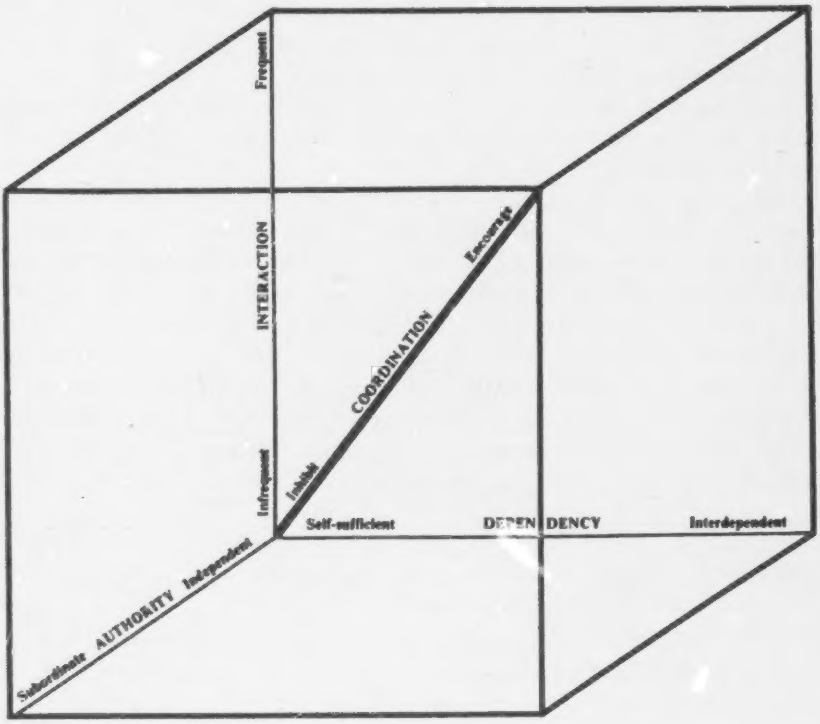
The purpose of this discussion of authority, dependency, and interaction is to emphasize the fact that a coordination process has no inherent power base from which to draw in order to effectively bring about coordinated decisionmaking. The most beguiling approach to coordination is to believe that one can achieve it through authoritarian commands. Coordination, by its very nature, is not the usurpation of one person's decisionmaking authority by another. In any case, state coordinating agencies are rarely in a position of hierarchical authority over those whose decisions they are trying to coordinate. At best, they may have access to a chief executive who has operational control over all the agencies involved. Therefore, coordination works best when all conditions described above are supportive. Coordination can seldom be forced upon those who are unresponsive to it unless the situation is right.

Coordination is not a panacea for solving all the problems inherent in intergovernmental and interagency relationships. It is a tool available to public officials and administrators which can ameliorate a limited range of problems. Coordination is essentially an attempt to build linkages between decisionmakers. The success it will enjoy in bringing about a smoother-operating criminal justice process will depend upon the environment in which it must work and the support it gets from those whose decisions will be affected.

Intergovernmental Activities Supportive of Coordination

Coordination is only one of a variety of intergovernmental and interagency services or activities provided by state governments. There is no reason why it should stand apart from these other activities. In fact, a coordination process could be strengthened if it were placed in an agency which also had responsibility for other interagency or intergovernmental services. The agency responsible for coordination could then utilize channels established through other interagency and intergovernmental services to enhance its acceptance and facilitate its utilization by the relevant agencies. These might include such responsibilities or

Figure 2
Combined Effect of the Three Variables upon the Likelihood of Coordination


Frequent
INTERACTION
Infrequent
Encourage
COORDINATION
Inhibit
Self-sufficient
DEPENDENCY
Interdependent
Independent
AUTHORITY
Subordinate

services as technical assistance, administration of federal and state grant-in-aid programs, supervisory responsibility for the state criminal justice information system, systemwide data analysis and problem identification, and sponsorship of conferences and workshops dealing with interagency issues and problems. A brief examination of several of these will serve to illustrate the value of integrating coordination with other services of an intergovernmental or interagency nature.

The provision of technical assistance to operating agencies, units of government, and the Legislature can be a strong inducement to coordinated criminal justice decisionmaking, if such assistance is provided on a judicious and discriminatory basis. To be consistent with the purposes and goals of a coordination process, and for optimum effectiveness, technical assistance should only be supplied in connection with or in support of program decisions which will have positive interagency impact. A number of the LEAA-funded SCJPAs currently provide, in varying degrees, technical assistance to criminal justice agencies, although such assistance is sometimes offered without considering whether it will promote interagency integrative decisionmaking or simply enhance decisionmaking around purely internal issues. Technical assistance has generally taken a number of forms, such as research, drafting and testifying on legislation, grant application assistance, and conducting training conferences and workshops. Whatever the nature of the agency responsible for criminal justice coordination, technical assistance is a viable function that should properly be provided on a selected basis to state and local projects which have major interagency program, policy, and resource allocation implications.

Cooperative decisionmaking can also be promoted through research on criminal justice system activities, trends, and needs on a statewide basis. A broad, reliable information base will provide all decisionmakers a clearer view of problems affecting the entire system and of the improvements which will be required to deal with them. A uniform data base will also enable participating agencies to better meet the grant management and reporting requirements of federal grant-in-aid programs.

Federal and state grant-in-aid programs represent a significant financial resource through which public officials and administrators can achieve some of their objectives and programs. Characteristically, grant-in-aid programs are intended to meet rather specific needs, are subject to central control, establish priorities, and assess the relative needs of those who apply for funds. Although a grant-in-aid program may not be specifically intended to bring about interagency or intergovernmental coordination and cooperation, it is not uncommon for the administering agency to find neighboring jurisdictions requesting funds for activities which could better be handled on an interagency basis. The administering agency is, therefore, in a position to encourage a merging of programs as a condition for funding.

This discussion of the use of money to promote coordination raises a point that deserves further elaboration. Control of financial resources represents a major point of leverage to bring about coordination. When agencies or units of government must seek funding from a common source, the budget review process can be a useful tool to encourage or even require coordination. In this regard, there are a number of approaches possible, depending on the level of government and the type of agency. Three state-level approaches will be discussed here to demonstrate the potential use of budgetary linkages to encourage coordination.

The most practicable and common approach, given an independent judiciary and separately elected Attorneys General, is for a Governor to confer upon a state coordinating agency the authority to review and comment upon state criminal justice budget requests before they are submitted to the Legislature. In States where the Attorney General is an appointive position and the judiciary submits its budget through the Governor's office, review and comment would potentially impact upon all state-level criminal justice agencies. This is comparable, at least in concept, to the A-95 review process instituted by the federal Office of Management and Budget which enables a Governor or his designated agency to review and make recommendations on federally assisted planning and development activities. According to the Advisory Commission on Intergovernmental Relations, in 1975 there were 11 SCJPAs which had the authority to review and comment upon proposed state-level criminal justice expenditures.[37]

Although the review and comment approach offers some potential to improve coordination, it often suffers from the basic weakness of the recommendations being binding only to the extent that a Governor is willing to adopt them. This weakness is further complicated by the tendency of state agencies to circumvent the review and comment process.[38] In many States where the Attorney General is separately elected or the judiciary submits its budget directly to the Legislature, the ability of a Governor to implement suggestions of the coordinating unit is greatly constrained.

A more binding, yet less feasible approach, is to strengthen "review and comment" to a "review and approval" power. Given the binding nature of review and approval, it is unlikely that Governors or Legislatures would vest a coordinating agency with this type of authority.

A third state-level approach is available in States with state-local revenue sharing programs. This would involve vesting the coordinating agency with either review and comment or approval over state revenue sharing funds provided for local criminal justice programs and activities.

States which are seriously committed to a policy of promoting coordination could also allocate general purpose funds, bond issue monies, or fines and levies to support interagency or interjurisdictional projects. Responsibility for the allocation of these funds could be given to the agency responsible for criminal justice coordination, thus providing it with an important tool to use when trying to bring about coordination. There are many examples of interagency or interjurisdictional projects that might be funded from such a pool of money. For instance, a consortium of urban law enforcement units may be funded from state or local general fund money to develop integrated and cooperative antiburglary strategies. Another example might be a bond issue designated for the purpose of constructing a network of regionalized jail facilities. A percentage of court fines or levies could be apportioned to a coordinating agency to arrange a series of judicial training seminars.

The central point of this discussion is to emphasize that coordination is as much a public policy objective as it is a formal process. Coordination can be promoted through a variety of means available to state government. Establishment of a formal coordination process represents only one method of achieving the policy objective, although it is probably the most crucial one. A coordination process needs to be supported through a variety of services and activities which can provide inducements for public officials and administrators to participate in it. Closer linkages between these means will be possible if the agency responsible for the formal coordination process could also have responsibility for these other types of interagency or intergovernmental activities.

Where Should Coordination Responsibility Reside in State Government?

States are gaining an increasing amount of experience with intergovernmental coordination. Therefore, it should not be difficult for States to give more specific attention to the need for coordination among criminal justice decisionmakers within a State. A variety of structures has been developed by States for handling intergovernmental matters and coordination of programs. In fact, they are almost as diverse as the number of States. One of the first issues to be confronted in establishing a state process for coordinating criminal justice decisions is to identify the agency that shall have such responsibility. At least three basic options might be considered: (1) assign the responsibility to the state agency that has coordinative responsibilities for other functional areas; (2) redefine the objectives of the state criminal justice planning agencies that were created and funded under the Omnibus Crime Control Act of 1968 and make them responsible for coordinating criminal justice decisions in the State; or (3) create a new bureau or agency within one of the criminal justice agencies of state government such as the department of corrections or the office of the Attorney General.

Most States already have created at least one agency, usually within a department of community affairs, which is specifically responsible for interlocal and state-local cooperation and coordination. Assigning responsibility for criminal justice coordination to such an agency would have the advantage of keeping all state coordinating activities within a single agency rather than allowing them to be fragmented along functional lines. States may prefer to enlarge the existing capacity of the responsible agency through the addition of criminal justice specialists. A State might want to consider merging the state criminal justice planning agency, which currently has responsibility for administration of the LEAA block grant funds, into the agency or bureau that already has responsibility for interagency or intergovernmental coordination. The staff of these LEAA-funded agencies possesses resources and expertise which a State cannot afford to overlook or abandon. In a number of States, the criminal justice planning agency is already located in the office of state planning or the department of community affairs, so a merger should not be very difficult to achieve.

A second alternative is to redefine the objectives of existing state criminal justice planning agencies. These agencies have become a significant resource in the criminal justice community. A major advantage of retaining an existing agency is maintenance of the working relationships that have been developed over the last eight years. In those States where the agency has good credibility with local officials, much of the resistance to state involvement in local criminal justice affairs has already been minimized. On the other hand, where the agency lacks such credibility, reshaping it into a state criminal justice coordinating agency could be counterproductive. Thus, the desirability of reshaping an existing SCJPA is, in part at least, dependent upon how local and regional officials perceive its utility.

A third alternative is to assign responsibility for coordination to a state agency which has criminal justice responsibility, such as a state department of justice or public safety or perhaps the office of the Attorney General. Coordination in this instance would be directed primarily toward state agencies, a process much different than when the coordination is primarily between state and local agencies or among local agencies. The major advantage of this alternative is the fact that the agency would be in the mainstream of criminal justice operations within the State. States such as Missouri and Kentucky have already given substantial responsibility for criminal justice coordination to their departments of public safety. There are, however, two disadvantages to this approach. The major drawback is the fact that criminal justice coordination responsibility would be separated from the other coordination processes established in state government. Adding to this, coordination objectives may be a relatively low priority in comparison to other operational program responsibilities of the criminal justice agency.

Since fragmentation is the major reason for creating a coordination agency, it makes little sense to fragment the coordination process itself. States have invested a great deal of effort in recent years to establish a variety of mechanisms and processes for dealing with intergovernmental relationships and problems which are really not that dissimilar from those found in criminal justice. Each State must carefully weigh the benefits to be gained by attempting to preserve the existing criminal justice planning agency structure, and balance them off against the disadvantages that would accrue from separating the criminal justice coordination process from the coordination process established by the State for other functional areas of government.

The Relationship between Planning and Coordination

The purpose of this report was to clarify the issues that should be addressed by a State when considering establishment of a state agency charged with responsibility for policy, program, and resource allocation planning for the entire criminal justice system within a State. Public planning was defined as the development of strategies by government for the achievement of specific objectives through governmental action. The feasibility of developing strategies for a functional area of government that is organizationally and politically fragmented was discussed. The importance of linking planning with decisionmaking in order to enhance the probability of implementation was also noted. The conclusion reached is that the implementation of comprehensive, across-the-board strategies for the improvement of criminal justice is extremely difficult.

States should attempt to build a strong capacity for criminal justice planning at all major decision points in state and local government. The abandonment of the notion that a centralized planning process can be effectively utilized for a highly fragmented intergovernmental process does not necessarily mean abandonment of a comprehensive perspective in planning wherever it occurs. Although States may wish to engage in centralized planning for limited objectives, it seems unwise to pursue centralized planning as a public policy if the intent is to utilize planning as a means of enhancing the daily decisionmaking of independent public officials or of superimposing an external set of objectives upon them. More specifically, the establishment of a state agency to be accountable for the criminal justice network is not a feasible concept.

A review of the history of criminal justice planning quickly reveals that advocates of centralized planning clearly wanted to do more than improve the decisionmaking of public officials. Centralized planning was perceived as a means of bringing about sweeping changes in criminal justice that would help to reduce crime in America. Apparently many people thought that planning could somehow transcend the problems of organizational and political fragmentation and, therefore, be an effective vehicle for making across-the-board changes in criminal justice policies, programs, and resource allocations. Such an expectation reflects a naive view of what planning can accomplish, and ignores the fundamental characteristics of a decentralized form of government. On balance, the benefits we gain through our inability to centrally plan for changes in the criminal justice system probably overshadow any losses incurred.

Although the initial objective of this report was limited to examining the issue of centralized planning for criminal justice, it seemed important to deal with one of the issues that invoked so much interest in centralized planning—the desire to bring order out of the chaotic array of differing policies, overlapping and competitive programs, imbalances in resources, and other organizational dysfunctions that have characterized the American criminal justice system. Clearly, centralized planning is not the appropriate vehicle for dealing with problems of this nature. Coordination rather than planning is a more effective means for achieving this objective. However, coordination is not an alternative to planning. Both are clearly different processes having different objectives. Both are important and desirable if States are to improve law enforcement and criminal administration.

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A return to the antebellum Constitution.

THE REHNQUIST COURT

BY OWEN FISS AND CHARLES KRAUTHAMMER

FROM THE MARSHALL COURT to the Warren Court, the role of the Supreme Court in determining the course of American political life has been widely acknowledged. It is harder to see how the Burger Court plays that role today. It appears to be adrift, but that impression is false. There is a vision that informs its work and shapes our politics. The source of that vision, however, is not Warren Burger. It is William Rehnquist.

Justice Rehnquist's leadership results from neither accident nor usurpation. He and Chief Justice Burger were appointed by the same President and have voted together to an astonishing degree—last term in 79.9 percent of all cases in which full opinions were issued. When he is in the majority, the Chief Justice has the privilege of deciding who speaks for the Court, and Burger has consistently chosen Rehnquist. In recent terms Rehnquist has written the opinion for the Court in almost all the important cases in which he was in the majority. Even his dissents set the terms of the debate among the Justices and often determine the evolution of future doctrine. It is not unusual for a Rehnquist dissent to become the majority opinion within a relatively short time.

If the pattern of decisions and the number of times he speaks for the Court are any indication, Rehnquist has considerable influence with the other Justices. Yet he does not have a secure majority. He is struggling for control: he is the leader, but the Court is divided, as is revealed by the striking increase in the number of cases in which no single opinion attains a majority of five. Justices William Brennan and Thurgood Marshall, principal forces on the Warren Court, usually oppose him. Justices John Paul Stevens and Harry Blackmun have increasingly become nonaligned, pulling away from both so-called "liberal" or "conservative" blocs, and often writing separate opinions.

Justice Rehnquist can usually count on the votes of Chief Justice Burger, Justice Lewis Powell, and, to a slightly lesser extent, Justice Byron R. White. When Potter Stewart was on the Court, he tended to be part of the same bloc. The appointment of Sandra Day O'Connor as his replacement is not likely to change the alignments. O'Connor has strong ties to Rehnquist. They were classmates at Stanford; and both she and Rehnquist spent almost all their adult lives in Phoenix, where they were members of the same social circles. Rehnquist has described O'Connor as a close personal friend. Shortly before her nomination, she published a law review article in which she revealed her admiration for Justice Rehnquist, her identification with his general philosophy, and the likelihood that she would move within his orbit of influence.

That orbit is likely to expand, given Rehnquist's energy, his youth (he is only 57), the clarity of his vision, and the likely pattern of future appointments. Under Reagan, Rehnquist's base of power will grow, since his constitutional program bears a remarkable similarity to President Reagan's new federalism. Five Justices, including Marshall and Brennan, are now in their mid-seventies and Reagan appears ready to use his appointment power to further his political views.

Rehnquist's intellectual and ideological qualifications for his leadership role have never been much in doubt. In 1952 he graduated first in his class from Stanford Law School. He then served as law clerk to Justice Robert Jackson before returning to practice in Phoenix in 1954. He spent the next fifteen years in a successful private practice before joining the Justice Department as an assistant attorney general in 1969. Two years later, President Nixon nominated him for the Supreme Court.

Long before he joined the Court, Rehnquist ardently and aggressively fought against the liberal ideas that were to find their deepest expression in the Warren Court. While still a clerk to Justice Jackson, he wrote a memorandum in defense of the *Plessy* v. *Ferguson* decision of 1896, which constitutionally legitimated Jim Crow laws. He wrote,

> To those who would argue that 'personal' rights are more sacrosanct than 'property' rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood, not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that

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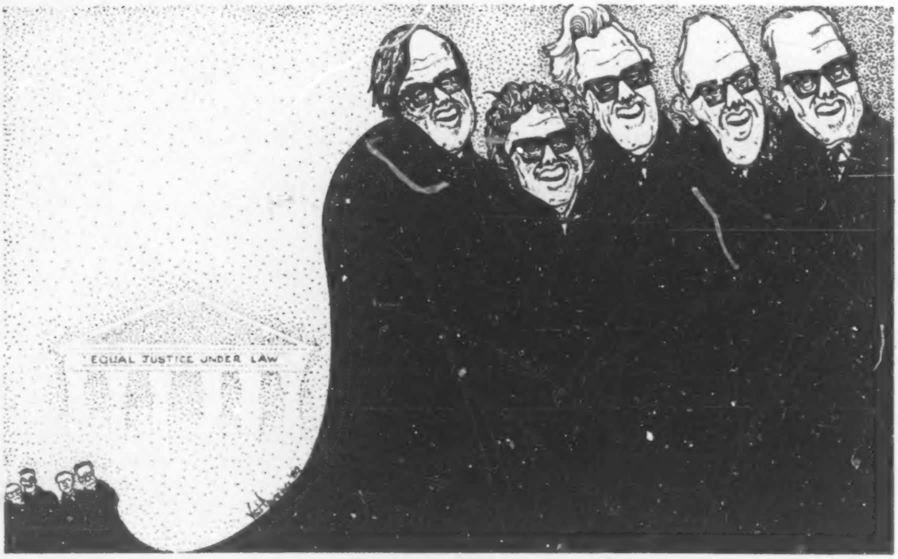

DRAWING BY VINT LAWRENCE FOR THE NEW REPUBLIC

> while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.

He continued in this vein in 1958, when he published a sweeping attack upon a series of decisions of the Warren Court that sought to curb the excesses of the McCarthy era. He began his article in a bar association publication this way: "Communists, former communists, and others of like political philosophy scored significant victories during the October, 1956, Term of the Supreme Court of the United States, culminating in the historic decisions of June 17, 1957." (Included among the so-called "historic decisions" was *Yates* v. *United States,* which set aside the convictions of American Communist leaders and thus sought to protect advocacy of belief. The *Yates* opinion was written by Justice John Harlan, a true conservative and a great judge, whom Rehnquist succeeded and whose name he often invokes to support his positions.) In 1964 Rehnquist stepped forward to register his opposition to a Phoenix ordinance designed to prevent discrimination in public accommodations. The issue, as he saw it, was "whether the freedom of the property owner ought to be sacrificed in order to give to these minorities a chance to have access to integrated eating places at all." Later, Rehnquist actively opposed a proposal by the Phoenix superintendent of schools for a voluntary exchange of students to reduce segregation. "[W]e are no more dedicated to an 'integrated' society," he wrote, "than we are to a 'segregated' society." That was in 1967.

Two years later, he joined John Mitchell's Justice Department. "He did not just work as a quiet drone in the Attorney General's office," Joseph L. Rauh later remarked. "He went out on the hustings as the Administration spokesman." Rehnquist publicly defended the nomination of G. Harrold Carswell to the Supreme Court, the mass arrest of antiwar demonstrators on May Day (as part of a " 'qualified' martial law"—his term), the use of the military to conduct surveillance of American citizens in the years following the Detroit riots, and the Administration's program to impose restrictions on the rights of government employees to criticize government policies. In 1971 President Nixon rewarded him with an appointment to the Supreme Court.

On the Court, Rehnquist's opinions have been clear, lucid, brief, and mercifully free of bureaucratese. He gets to the point quickly and does not decorate his opinions with authorities he has neither read nor understood. On the other hand, his opinions fall radically short of the ideals of the profession. He repudiates precedents frequently and openly, and if that is impossible (because the precedent represents a tradition that neither the Court nor society is prepared to abandon), then he distorts them. For example, we are told by Rehnquist that the *Debs* case, involving one of the great strikes in American history, was simply "an armed conspiracy that threatened the interstate transportation of the mails." He creates his own precedents out of asides: he places apparently inconsequential statements unobtrusively in one opinion, only to use them several opinions later—when he makes them seem of central importance to the earlier case and decisive to the case at hand. He manipulates trial records, as when he tried to discredit the findings of a trial court, affirmed by a court of appeals, that a pattern of police harassment of minorities had occurred in Philadelphia. Rehnquist saw only isolated incidents. He will also occasionally substitute slogans for analysis, as when he dismissed a grievance against overcrowded jails on the grounds that the Constitution does not guarantee "one man, one cell."

These failings of craft have attracted much attention, especially from the bar, preoccupied as it often is with process rather than substance. But the real problem with Rehnquist is substance. Rehnquist has a constitutional program for the nation: he wants to free the states from the restrictions of the national Constitution, particularly those emanating from the Civil War Amendments and the Bill of Rights. His ideal is state autonomy—and for a decade he has been working methodically to make it a reality.

BEFORE THE CIVIL WAR, it was established doctrine that the Bill of Rights limited only the national government, not the states. The Civil War Amendments radically changed that. The Fourteenth Amendment, in particular, placed far-reaching restrictions on the states. It forbade states to "abridge the privileges and immunities of citizens of the United States," to "deprive any person of life, liberty, or property, without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws." These generalities have been construed as "incorporating" almost all of the more specific protections of the Bill of Rights, thus making them applicable to the states. This process of incorporation began at the turn of the century, with the protection against confiscation of property, and reached its fullest expression during the Warren Court.

Rehnquist has denounced the incorporation doctrine. He has, for example, advocated wider latitude for the states than for the federal government in regulating speech. He acknowledges, of course, that states are bound by the generalities of the Fourteenth Amendment, but he insists that the Bill of Rights is not to be used as the measure of compliance. The states are to be held to an indeterminate lesser standard.

In defending this position, Rehnquist often cites Justice Harlan, who also rejected the incorporation doctrine. But though Harlan held the states to a lesser standard, he held the *federal* government to a very high standard indeed, as evidenced by his objection to federal obscenity prosecutions. Rehnquist has yet to follow Harlan's lead of vigorously applying the Bill of Rights against the federal government. His rejection of incorporation works in only one direction—in favor of state autonomy.

With the possible exception of Powell, no Justice on the present Court has so far shown a willingness to follow Rehnquist in his rejection of the incorporation doctrine. But Rehnquist has marshaled a majority of the Court for another strategy to serve his as yet too radical view of state autonomy: imposing strict limits on the powers of the federal courts and Congress.

The decisive turn against the courts came in 1976 in *Rizzo* v. *Goode*, the suit charging a pattern of police abuse of minorities in Philadelphia and seeking structural reform, including an internal disciplinary system, to reduce the likelihood of such abuses. The suit was modeled on the standard school desegregation case, which has almost always been brought in federal courts. Rehnquist dismissed *Rizzo* because the remedy required a federal institution (a federal court) to oversee the operation of a state agency. In this conclusion, he departed radically from the principle, implicit in *Brown* v. *Board of Education* and subsequent cases in the 1960s, that the federal courts are the primary guardians of federal constitutional rights.

The *Rizzo* plaintiffs could still seek redress in the state courts. On the surface, *Rizzo* did no more than shift power from one set of judges to another, both applying the same law. But the consequence of such a reallocation of power is likely to be great. It would be the equivalent of entrusting the implementation of *Brown* to the state courts. By and large, state judges, unlike federal judges, lack the independence that comes with life tenure; they are more subject to the shifting tides of politics. Transferring power to the state courts will reduce the level of enforcement and make more uneven the implementation of Fourteenth Amendment protections.

Rehnquist is not alone in attacking the federal courts for undertaking structural reform of state agencies of the type contemplated in *Rizzo* or *Brown*. But what most critics oppose is judicial activism. They think it inconsistent with our democratic ethos for courts to usurp the power of elected officials and do their work. Rehnquist, on the other hand, is a judicial activist. In his devotion to state autonomy he does not flinch from using the power of the judiciary to restrict the powers of the elected branches, and particularly of Congress.

A MAJOR ASSAULT on Congressional power occurred just last term in *Pennhurst State School* v. *Halderman*. The Court had before it a 1975 Congressional statute that had two objectives: to give money to the states for the mentally retarded and to codify the rights of the institutionalized mentally retarded. In the second aspect, Congress had, in effect, enacted a bill of rights (it was called just that) for the mentally retarded. Writing for the majority, Rehnquist ruled that those rights have no legal force; they are only

JUSTICE O'CONNOR'S FIRST SIX MONTHS

When Ronald Reagan plucked Sandra O'Connor from obscurity last summer and made her the first woman to sit on the Supreme Court, the nation cheered. Richard Wirthlin, the President's pollster, says that the O'Connor nomination was one of the principal events last year that contributed to Mr. Reagan's popularity. It was such a widely admired political masterstroke that Mrs. O'Connor, a 51-year-old state court judge from Arizona, was supported by both liberals and conservatives, a division usually at its sharpest when it comes to judicial nominations.

Yet despite all the fascination with her nomination, little was actually learned about what kind of Justice she would be. During her confirmation hearings before the Senate Judiciary Committee, she faced nothing more minatory than a clumsy interrogation about her views on abortion by three newly elected Moral Majoritarians: Jeremiah Denton of Alabama, John East of North Carolina, and Charles Grassley of Iowa. Confronted by her moral inquisitors, she offered repentance: she simply renounced her once-held moderate views on abortion and publicly regretted her legislative record on the subject. It didn't seem to matter whether her change of heart was one of conscience or convenience, since feminists, and even abortion rights advocates, were eager to see her confirmed.

The only time anything approaching a serious question of judicial philosophy occurred was during a colloquy with Senator Howard Metzenbaum, Democrat of Ohio. Mr. Metzenbaum said he was concerned about a recent law review article by Mrs. O'Connor that argued that plaintiffs should be limited in appealing their cases in federal courts. Mrs. O'Connor, who sought to avoid discussing anything substantive which could harm her chances, remarked that she regretted having written the article because of the questions it was raising.

But now, halfway through her first year on the bench, she has gradually begun to reveal herself. Her vote has not always been predictable. But she has cast her lot often enough with law-school classmate William Rehnquist and with Chief Justice Burger to help forge a clear conservative majority on a number of crucial issues.

On January 12, Mrs. O'Connor justified Senator Metzenbaum's particular concern when she provided the fifth vote for a bare majority ruling that ordinary taxpayers could not sue in federal court to prevent the government from giving away valuable surplus property to a religious group. The decision turned upon the concept of "standing," or who is a proper party to bring a suit, a concept that is at the center of the philosophical debate over how active the federal courts should be in attempting to redress wrongs. The case, *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, may be the best barometer this year of a Justice's view of the courts and the Constitution.

Mrs. O'Connor joined the opinion of Justice Rehnquist, who derided the notion "that the business of federal courts" is to go around "correcting constitutional errors." Justice Brennan, dissenting sharply, accused the majority of engaging in "a dissembling enterprise" that will "slam the courthouse door" in the faces of people who believe that their constitutional rights have been violated.

In another case involving the role of federal courts, Mrs. O'Connor voted with five other Justices to uphold a 40-year prison sentence for a Virginia man convicted of possession of less than nine ounces of marijuana. In an unsigned opinion, the majority chastised the lower federal court judge for daring to second-guess a state court judge and a state legislature. The Justices in the majority said that federal courts could consider apparently unfair sentences only in the most extreme cases. The example they gave was life imprisonment for overtime parking.

At times, however, the Burger-Rehnquist line has been too much for Mrs. O'Connor. On January 19, she provided the fifth vote to strike down a death sentence that had been imposed on a 16-year-old boy in Oklahoma. The sentence was invalid, the Court ruled, because the sentencing judge had refused to take the youth's troubled and violent upbringing into account.

Chief Justice Burger wrote the dissent. He expressed the view that the lower court had indeed been aware of the boy's bleak past; the judge's statement that he had not considered it was "purely a matter of semantics." And, Mr. Burger wrote, in a curious turn of phrase under the circumstances, "There comes a time when every court must bite the bullet." This was the same brand of impatience expressed last year by Mr. Rehnquist when he urged judges to "get on" with the business of putting people to death and not be deterred by continuing appeals.

In the case of the 16-year-old killer, Mrs. O'Connor so strongly disagreed with Burger and Rehnquist that she took the trouble to file a separate opinion castigating the dissenters. She noted that the Court had always taken extraordinary care when the death penalty was involved, because capital punishment is so final. As to whether the boy's background was considered by the judge, or whether, as Mr. Burger claimed, it was a false issue, Mrs. O'Connor responded by saying, in effect, Let's take the time to find out and be sure. But her action may be of dubious significance in the end. If the case returns to the Court after the state judge considers the boy's past, she may well vote to have him executed.

Mrs. O'Connor's record so far suggests she will not alter the steady conservative momentum of the Court. But, as judicial scholars agree, it is difficult to predict how a Justice's philosophy may evolve over his or her years on the bench. And as the youngest member of the Supreme Court, Justice O'Connor may be with us until well into the twenty-first century.

NEIL A. LEWIS

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advice to the states. The talk of rights for him was only "precatory."

Congress's power to impose on the states a bill of rights for the mentally retarded could easily be derived from Section Five of the Fourteenth Amendment, which allows Congress to enforce by legislation the rights guaranteed in the amendment. (Congress has used Section Five and comparable provisions in the other Civil War Amendments to justify important civil rights legislation like the Voting Rights Act of 1965 and the Civil Rights Act of 1968.) The legislative record makes it clear that the portion of the 1975 statute guaranteeing the rights of the mentally retarded was understood as an exercise of Section Five power.

That was not good enough for Rehnquist. He held that in order for legislation even to be considered an exercise of Section Five power, Congress must *specifically* invoke that power, something it had failed to do in enacting the 1975 law. The stated reason for Rehnquist's rule was, once again, state autonomy: since all Congressional actions under Section Five constrain the power of the states, they necessarily threaten state autonomy and, for that reason, should be disfavored. Rehnquist thus implicitly repudiated the time-honored rule, based on the respect for Congress as a coordinate branch of government, that whenever Congress acts it is assumed to exercise *all* of its powers under the Constitution.

HAVING LIMITED ONE source of Congressional power, Rehnquist then turned in *Pennhurst* to the task of protecting state autonomy from another: Congress's spending power. The 1975 statute could reasonably be understood as an exercise of that power (even if it were not considered an exercise of Section Five power). The Department of Justice argued that because the states were using federal funds in their programs for the mentally retarded, Congress could impose on the states obligations regarding the rights of the mentally retarded, and had in fact done so in the 1975 act. Rehnquist refused to accept that argument. He reduced Congress's power under the Spending Clause to a power to offer the states a contract. For him, "the legitimacy of Congress's power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Applying the principles of private contract law, he insisted that Congress specify the conditions of this "contract" with the same degree of clarity one would require of a bargain between two farmers over the sale of a cow. Since the provisions in the 1975 legislation protecting the rights of the mentally retarded did not have the requisite clarity, he refused to give them legal effect.

This ruling, like the one disfavoring the use of Section Five, is not an absolute restriction on Congressional power. It is more in the nature of a procedural limitation. Congressional action is still possible, but more difficult. The clarity that Rehnquist demands is an ideal that is largely unrealizable, and probably always variable. Even if Congress can overcome these barriers, Justice Rehnquist will doubtless find others. This suspicion arises from statements in his opinion in the *Pennhurst* case—once again, virtual asides—that reserve his options if, by chance, Congress is able to overcome procedural barriers. It also arises from his willingness to impose more substantive restrictions on Congress in other domains, such as the regulation of commerce.

Though Section Five of the Fourteenth Amendment and the Spending Clause are important contemporary sources of national legislative power, most of the growth of Congressional power in the twentieth century has been under the Commerce Clause. This grants Congress the power to regulate commerce among the states, and it has been construed as a broad grant of authority, subject to little more than the prohibitions of the Bill of Rights. The results have sometimes been momentous. The Civil Rights Act of 1964, for example, was viewed as a proper exercise of the commerce power because it prohibited racial discrimination in public accommodations using goods that moved in interstate commerce.

Rehnquist has refused to accept the accretion of Congressional power that has occurred under the Commerce Clause. Against it he has elevated state autonomy to a constitutional value of the first rank, using it to limit Congressional action as the Warren Court might have used freedom of speech or other values from the Bill of Rights. In *National League of Cities v. Usery*, Rehnquist used state autonomy to invalidate a federal statute prescribing minimum wages and maximum hours for employees of states and localities. "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest," he wrote, "we think there would be little left of the States' 'separate and independent existence.'"

The doctrine of *Usery*, like the *Pennhurst* rule reducing Congressional legislation to contract, resurrects the notion of "state sovereignty," which sees the states as almost coequal to the nation, and as tied together only by formal compact for limited ends. The reach of this doctrine is considerable. As Archibald Cox once said of equality in the Warren era, the idea of state sovereignty, once loosed, is not easily cabined. In *Usery* it was used to curtail the power of Congress to regulate relations between the states and their employees. It may eventually be used to curtail all exercises of Congressional power affecting the states.

REHNQUIST'S CHAMPIONING of state autonomy may make him a hero to conservatives, but that acclaim would be ill-deserved. He is no conservative, as that term is ordinarily understood in the law, but rather a revisionist of a particular ideological bent. He repudiates precedents; he shows no deference to the legislative branch; and he is unable to ground state autonomy in any textual provision of the Constitution. On occasion, he invokes the Tenth Amendment, but it cannot carry the full weight of his program. Accordingly, he eschews what he calls "literalism" and speaks instead of the "implicit ordering of relationships within the federal system" and the "tacit postulates yielded by that ordering."

There is a special irony to Rehnquist's repudiation of "strict constructionism" given the rhetoric of the President who appointed him, just as there is irony in his willingness to use the judicial power to invalidate the work of Congress and thus engage in his own brand of judicial activism. But irony is not tantamount to error. After all, the Marshall Court (in its affirmation of nationalism) and the Warren Court (in its affirmation of equality) also repudiated strict constructionism and practiced judicial activism. Both would agree with Rehnquist when he argues that "the tacit postulates . . . are as much engraved in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning." They would also agree with him that the task of the judiciary is to give expression to the values embodied in the Constitution, even if that means enforcing those values against the elected branches. The difference among these various Courts lies in the domain of substance. Rehnquist's goal is the affirmation of state autonomy, and the legitimacy of his enterprise will ultimately turn on his capacity to ground that value in the Constitution.

WHEN REHNQUIST speaks of being guided by the "tacit postulates" of the Constitution, he is referring neither to the needs of contemporary society nor to prevailing social morality—which he disparaging calls "the living Constitution." He is talking about the historical Constitution: historical imperatives derived from the understanding at Philadelphia. For Rehnquist the task of the Court is to look back to 1787 and to reconstruct the intent of the drafters of the Constitution. The epistemological and evidentiary problems of such an undertaking are staggering. But those problems do not disqualify Rehnquist's position. He can assert that the duty of the Supreme Court is to interpret the text and that the most authoritative source for such an interpretation, apart from the words on the parchment, is the original intent of the framers.

Admittedly, Rehnquist's historicism seems to operate in a peculiar way, in that he wishes to honor the Constitutional Convention of 1787 but not the judicial precedents that have been set since then. This use of history is at odds with the common law conception of the judicial craft, with its emphasis on precedent. But once again it is not idiosyncratic. The Marshall Court did not have the burden of precedent; the Warren Court often rejected it. The most plausible interpretation of *Brown* is that it simply repudiated *Plessy*, in an attempt to reflect a truer understanding of the Fourteenth Amendment. For the Warren Court, as for Rehnquist, precedent had less force than the framers' original understanding of the text they wrote.

But Rehnquist takes his devotion to history one step further. He is so determined to justify state autonomy that, besides giving a questionable historical reading of 1787 (he seems to confuse the Constitution with the Articles of Confederation), he ignores what has happened since—the Civil War, for example. And for good reason. The Civil War decided the issue of state autonomy. It denied the states what might be regarded as the one essential attribute of sovereignty—the right to withdraw from the Union. It affirmed the organic relationship between the states and the nation; it denied that the states have a "separate" and "independent" existence; it repudiated the doctrine of dual sovereignty, and located sovereignty in the nation. The Civil War Amendments were a codification of these understandings. They were not merely technical modifications to what Rehnquist claims to be the understanding at Philadelphia, corrections that assured all persons formal equality before the law. Rather, these amendments represent a second starting point, a basic change in the postulates of our constitutional system. Any appeal to history which ignores that is a sham.

THERE IS, HOWEVER, another way of understanding the idea of state autonomy, which may be the true source of its appeal. It arises from the romance with Jeffersonianism and the view that state autonomy is not an end in itself, but part of a larger system to protect liberty. (President Reagan also defends the transfer of power to the states, his new federalism, in the name of a higher value—democracy. The slogan is returning power to government that is closest to the people.) If Rehnquist's ideal of state autonomy is indeed in the service of liberty, we might be inclined to accept his revisionist reading of history. But is it?

The argument that it is rests on an identification of liberty with limited government: that which governs best, governs least. State government is assumed to be the best because it is the weakest and most limited. Those threatened by a state, so the argument must continue, always have the option of moving from one state to another. But this assumes that persons or groups threatened by one state can move to another; that other states will not be swept by similar urges of absolutism; and that the idea of the nation can persist in the face of diversity on the fundamental rights of citizens. One would have thought that this country had already learned the dangers of a house divided.

The argument from liberty also ignores the fact that today the states, and not the federal government, pose the greatest danger to liberty. If, as Rehnquist insists, the agencies of the central government, including Congress and the federal courts, are denied the power to protect basic rights and liberties (such as free speech, the right to be secure in our homes and persons, and the rights involved in *Pennhurst* and *Rizzo*) against threats by the states, then liberty is diminished, not enhanced.

STATE AUTONOMY occasionally produces surprising results. In one case, for example, Justice Rehnquist permitted the California State Supreme Court, acting under the state constitution, to require a shopping center owner to subordinate his property rights and allow leafleting on his property. This decision was an important victory for free speech (if you live in California), and is a credit to the consistency of Rehnquist's commitment to state autonomy. A liberal should be grateful for the result, but careful not to generalize from it. The more likely consequences of state autonomy can be seen in Rehnquist's willingness to sustain state censorship of allegedly obscene material and his refusal to set any limits on the process or substance of the criminal law administered by the states. For example, Rehnquist is not the least troubled by a Texas law that imposed a life sentence on an individual for obtaining $120.75 under false pretenses. (He accepted payment for repairing an air conditioner and never did the job.) True, the individual had been convicted twice before, for frauds of $80 and $28.36. But from the perspective of state autonomy, it is hard to see why these details matter. As Rehnquist noted with icy serenity: "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."

Such cases suggest that with respect to liberty, the value of state autonomy is neither neutrally chosen nor neutral in its likely outcome. On the whole, liberty will not be enhanced--unless liberty is reduced to property. Rehnquist prefers state autonomy because it is more consonant with classical laissez-faire theory which reduces the function of government to protecting private exchanges and the aim of the Constitution to protecting the rights and expectations of property holders. Laissez-faire is predicated on the sharp distinction between private and government actions. And Rehnquist insists in making this distinction, particularly to protect state action from the constraints of the Fourteenth Amendment. He refused to apply the Fourteenth Amendment to a utility company upon which Pennsylvania had conferred a local monopoly—on the theory that the company is not the State. He also refused to apply the amendment when Pennsylvania denied blacks equal protection by conferring a liquor license on a club that excludes blacks. Mere support for private sector discrimination is not enough for Rehnquist; the state must discriminate directly.

Another threat to laissez-faire in Rehnquist's view is the federal regulatory agencies. He has, for example, sought to impede the capacity of Congress to regulate business activities by objecting to its practice of delegating powers to administrative agencies (thus drawing on the expertise those agencies possess). Invoking a doctrine once used to stymie the New Deal, Rehnquist has argued that federal safety legislation is invalid because Congress gave the Secretary of Labor too much discretion. The statute directed the Secretary to make the work place as safe as "feasible," and Rehnquist sees the use of that word—commonplace in all regulatory measures—as excessive delegation.

Rehnquist seeks to transfer power from the federal government to the states because the states are principally concerned with preserving property and public order. But where the states threaten property, Rehnquist sometimes is prepared to sacrifice state autonomy, once again revealing his underlying ideology. He voted to invalidate a Minnesota statute requiring firms leaving the state to contribute to a pension fund for their former employees; he voted to invalidate a New Jersey statute allowing the Port Authority to use funds for purposes other than securing bonds; and he voted against a New York City law requiring that Grand Central Station be maintained as a landmark. The first two he saw as impairing the obligations of contract and the third as breaching the constitutional duty of the state not to take property (from the owners of Grand Central) without just compensation.

REHNQUIST THUS uses state autonomy less to promote liberty than to promote property. He also uses it to repudiate the central value promoted by the Warren Court—equality. The Warren Court's belief in equality led it to take a critical view of the status quo and of existing distinctions of power and privilege. It saw government power not as a necessary evil to be tolerated, but as an important instrument for fully realizing the values embodied in the Constitution. State autonomy was not itself an ideal, but only a technique of administration. The function of government was not to be a night watchman, controlling disruptions of the status quo, but to guarantee the very conditions of freedom, to abolish caste, and to provide equal protection for all citizens.

That vision is receding, most obviously in President Reagan's attempt to dismantle federal institutions and to leave the dispensation of rights and privileges in the hands of the states. Reagan's new federalism will meet stiff opposition, and possibly ultimate defeat, in Congress. But while that epic battle is fought on page one, a somewhat quieter, steadier, and more lasting erosion of federal power and the values it serves is taking place on the Supreme Court. Reagan may be running out of time and prestige to carry out his antebellum vision of federalism. Rehnquist appears to have plenty of both.

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Court reform: do critics understand the issues?

By treating court reform as if it were a universal prescription, critics are overlooking the significant achievements of specific reforms in specific contexts.

by Dale W. Good

Court administrators find little collegial support for their court reform efforts in the court management literature. The administrators may agree about the value of modern management techniques for processing information, planning and systematic decision-making, but commentators show no such consensus. In fact, two recent *Judicature* authors illustrate well the wide disagreement between commentators and practicing administrators.

On the one hand, Geoff Gallas not only questions the central policy tenets of court reform such as unified court systems, central rulemaking authority and technical workload/productivity analyses for equitable judicial resource allocation, but also takes dead aim at the methodological cornerstone of court reform.[1] He surveys the issues that he believes require further research and concludes that his review ..."contains a mostly implicit argument for more confidence in informed qualitative judgments as against clean quantitative methods."[2]

On the other hand, Stuart Nagel and colleagues, tackling one of the major court reform projects—reduction of case backlogs and pretrial delay—recite a "cookbook" of "clean quantitative methods" for that purpose.[3] Nagel tells us that the court administrator can easily apply sophisticated techniques of management science, such as queuing methodology, critical path methods, optimum choice analyses, and Markov chain analyses. Nagel concludes:

> ...the frequency of the application of these models has not been proportionate to their potentiality and has been limited to those skilled in the methods of modeling but not necessarily knowledgable of the legal process. What may be particularly needed is an awareness of these modeling theories among practicing attorneys, judges, judicial administrators, legal researchers, and others involved in the legal process.[4]

Unfortunately, if Nagel's "cookbook" methods are seriously considered, they may do more to chill than to evoke enthusiasm for the application of scientific management methods to court administration. Indeed, John Paul Ryan, in a critique of Nagel in the same issue of *Judicature*,[5] anticipates Gallas' theme when he argues that:

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[1] Gallas, *Court reform: has it been built on an adequate foundation?*, 63 JUDICATURE 28 (1979), and Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUST. SYS. J. 35, (1976). Unless otherwise noted, references to Gallas relate to the more recent article.

[2] *Id.*, at 37.

[3] Nagel, Neef, and Munshaw, *Bringing managment science to the courts to reduce delay*, 62 JUDICATURE 128 (1978); and, Nagel and Neef, *Time-Oriented Models and the Legal Process*, 1978 WASH. U. L. Q. 467.

[4] Nagel, *Time-Oriented Models and the Legal Process*, *supra* n. 2, at 518.

> It has been fashionable in the literature of judicial administration to remove from easy purview questions focusing on the equity, or the distribution of, and access to, justice. Management practices are often spoken of in the context of science or 'operations research.' Competence of personnel is often appraised on narrow 'technical' grounds. Nevertheless, policy questions are resilient, not easily buried even by a slew of management jargon.[6]

Nagel commits the error of which Gallas and Ryan warn—ignoring the political outcomes or policy questions obscured by "management science." He also commits an equally grievous mistake in failing to recognize the range of types of litigation and the diversity of procedures for different kinds of cases. Thus, to a court administrator, his techniques seem at best problematic and at worst academic esoterica.

Ultimately, the administrator finds almost no guidance in the professional literature. Gallas tells a judiciary or legislature which is hostile to any change in established procedures or to short term increases in public expenditure for potential long-term savings that the whole edifice of judicial administration and its reliance on modern quantitative techniques may be wrong; Nagel then confirms their belief that modern court managers are expounding other worldly, abstruse and impractical methods![7]

A healthy development

But is this difference in perspective so tragic? No, it is a healthy development which mirrors a similar and more vigorous debate on methodology that has occurred in the social sciences for a decade or more.[8] Political science, sociology, public policy analysis and even public administration have debated these same issues of "value neutrality," "political outcomes" of administrative processes, and the apparent elevation of technique and method over values or "ends." Indeed, this debate has a long history on an intellectual plane in the philosophies of science and social science.[9]

But if the intellectual development of the court administration field is going to have any value for the administrator in the field, it is necessary to seek out some practical level for the application of these theories. It is clear that court administration should not abandon court reform agendas—as long as these techniques are also applied with a sensitivity to qualitative or political implications. Nor can court administration adopt clean, quantitative methods wholesale, without careful application to the court environment.

This article critically evaluates the positions adopted by Gallas and Nagel and then discusses how court administration can apply management science on a more realistic level. In particular, it examines efforts in Minnesota to achieve certain court reforms by utilizing management techniques. One of our state court management projects, for example, seeks to make access to judicial resources more timely and equitable by using one kind of operations research—queuing theory—applied to a weighted caseload analysis, along with a caseload information system that accounts for diversity in litigation. Such a project strikes a practical middle ground between the extremes of Gallas and Nagel by interweaving management techniques and specific reform goals.[10]

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[5] Ryan, *Management science in the real world of courts*, 62 JUDICATURE 144 (1978).

[6] *Id.*, at 146.

[7] It may be argued that these are only two or three articles from a now relatively large body of literature on court administration and "operations reasearch" or scientific management techniques within a court environment. However, they are representative of the variation in perspective and the authors are certainly among the intellectual leaders of the field.

[8] In political science, these issues were expressed most directly by the critics of behavioralism and the scientific methods, especially by the Caucus for a New Political Science. *See*, e.g., Surkin and Wolfe, eds., THE END OF POLITICAL SCIENCE: THE CAUCUS PAPERS. New York: Basic Books, 1979; and Graham and Carey, eds., THE POST-BEHAVIORAL ERA: PERSPECTIVES ON POLITICAL SCIENCE. New York: David McKay, 1972.

In sociology *see*, Mills, THE SOCIOLOGICAL IMAGINATION. New York: Grove Press, 1959 especially pp. 50-75 and pp. 113-131. The intellectual challenge to scientific sociology was fueled by such works as Alvin Gouldner's, THE COMING CRISIS IN WESTERN SOCIOLOGY. New York: Avon Books, 1970 and John O'Neill's, SOCIOLOGY AS A SKIN TRADE: ESSAYS TOWARD A REFLEXIVE SOCIOLOGY. London: Heinemann Books, 1972.

[9] The historical roots of this contemporary dispute over methodology can be traced to the first 'Methodenstreit' concerning economics occurring in the 1870s to 1880s in Germany, and its continuation among European social scientists in the 1950s and 1960s. *See* Adorno, Albert, Dahrendorf, Habermas, Pilot, and Popper, THE POSITIVIST DISPUTE IN GERMAN SOCIOLOGY, trans. by Adey and Frisby. London: Heinemann Books, 1976, especially the introduction by David Frisby, pp. ix to xliv.

Two basic flaws

There are two fundamental flaws in Gallas' analysis of the effectiveness of the court reform movement. First, although we can trace the historical roots of the reform movement to Pound and Vanderbilt, it is clear to most observers that states have undertaken major reform activity only in the last decade, and the results of such reforms may not be evaluated for a long time. It takes far longer to introduce an administrative reform, for example, than for the U.S. Supreme Court to announce a major decision, await its implementation, and see its effects on the law or other institutional practices.[11] Indeed, Gallas may be testing the foundation of court reform before it has been given a chance to temper.

It may be, though, that Gallas is simply adopting a classical conservative posture of demanding extensive proof before making changes in the status quo. His approach is entirely responsible unless he creates a "Catch-22"—demanding proof of success before a reform is implemented rather than simply demanding proof of the failure of the status quo. Gallas neglects to analyze the failures of the court system before a reform, but he demands proof of success before any reform is implemented.[12]

A second major flaw in Gallas' work is that, for the most part, he treats "reform" as if it were a uniform set of principles in the literature. But, when he criticizes institutional research on reform, he laments the fact that it is specific only to that context—"focused on one jurisdiction and problem"—and therefore, devoid of "reliable and valid generalizations."[13] But that may not be so unusual a problem.

Reliable generalizations frequently are more restricted in scope, more context-specific than the social scientist would want us to believe. In fact, the meaning of reform, the impetus for reform, and therefore, the evaluation of its success, are *inherently* context-specific. The goal of a particular reform (reducing pretrial delay, for example) may be understood only in terms of a specific jurisdiction *and* a specific type of case (civil or criminal). The impetus for reduction of delay in criminal cases may be, in one jurisdiction, primarily a civil libertarian gesture ("justice" or "equity") and in another, in conjunction with a pretrial release program, a "conservative" cost-cutting measure (lower public expenditures). Likewise, the motivation for both reduced pretrial delay and centralized rulemaking for civil cases may be a further step in the historical trend toward the rationalization of the law and legal process demanded by a complex economy, complicated property rights, and economic entities conducting business across geographical and political boundaries.[14]

Seen in this light, movements for reduction in civil case delay are conceptually analogous to the movement for a Uniform Commerical Code. Corporations which may occasionally file a civil suit in, say, Cook County, Minnesota

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[10] Part of this article may be read as overly academic, a point for which the two authors are being implicitly criticized. However, at least in the case of Gallas, it is necessary to address the details of his argument about court reform before one may question his conclusions. Judges, lawyers and court administrators may not share Gallas' social science research background and thus may wrongly accept his conclusions because they cannot challenge the details of his supporting arguments.

[11] *Cf.*, Cannon, *The exclusionary rule: have critics proven that it doesn't deter police?*, 62 JUDICATURE 398 (1979) for a current analysis of impact and implementation patterns.

[12] A minor but similar point is evident when Gallas (*supra* n. 1, at 29) discusses Kuhn's THE STRUCTURE OF SCIENTIFIC REVOLUTIONS. Chicago: University of Chicago Press, 1970. Gallas superficially reads Kuhn and concludes that challenges to court reform may be leading to a change in the dominant paradigm. However, Kuhn, who is an historian and philosopher of the natural sciences, utilizes the concept of "paradigm" to reflect the subtle historical interplay of the "knower," the scientist and his/her conceptual framework, and the "known," or "objective reality" being investigated. Kuhn believes that a paradigm shift occurs only after the old paradigm can no longer explain all the questions being raised about that "objective reality" and that the new paradigm or conceptual framework which takes its place *subsumes or incorporates all that which has been explained* by that which preceded it. Mr. Gallas fails to recognize that a new such paradigm only acts as a naysayer of the old. See Kuhn, p. 5.

For an excellent and readable overview of the change in the philosophy of science and social science, *see* Mason, THE BROKEN IMAGE: MAN, SCIENCE AND SOCIETY. New York: Doubleday, 1966. A leading work in the rethinking of the methodological assumptions of the sciences is Polanyi's, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY. New York: Harper and Row, 1964.

[13] Gallas, *supra* n. 1, at 36.

[14] Rationalization has a specific meaning as used here—formal, predictable, etc. See, for example, the analysis of the relationship between Anglo-American jurisprudence and economic development in Max Weber's seminal, "Sociology of Law" (Rechtssoziologie) as the seventh chapter of WIRTSCHAFT UND GESELLSCHAFT, Tubingen, J.C.B. Mohr, 1972; or MAX WEBER ON LAW IN ECONOMY AND SOCIETY, edited by Max Rheinstein. Cambridge, Mass.: Harvard, 1954.

expect and demand a relatively similar procedural and substantive context as they would find in Hennepin County, Minnesota (Minneapolis) or Cook County, Illinois (Chicago). Certainly the forces at work in bringing about reform in civil cases may be quite unlike those advocating reform in criminal procedure.

Gallas thus appears to be misdirected in treating the reform program as monolithic and then (by implication) questioning its success without reference to context. Indeed, as I discuss later, not only is the *application* of reform context-specific (the particular reform and when and how it is applied), but the *evaluation* of its success also must be context-specific.[15] For these reasons, Gallas' conclusions about court reform are both premature and abstract.[16]

Management insensitive to politics

Though Stuart Nagel and his colleagues advance sophisticated management science for court administrators as a means to effect reform,[17] they give little indication of the relevance of these concepts to court administration. Indeed, their treatment of these techniques within a court context appears to be insensitive to qualitative and political issues—the central concern of Gallas.

Nagel asserts that queuing theory, one of several operations research techniques which he discusses, can be a useful management tool by which courts can systematically reduce case-processing delay. He explains that the mathematics of queuing theory relates "arrival" rates to "servicing" rates based on the number of "servers." While the concept may be intuitively reasonable as a means of dealing with case backlogs or case delay, Nagel's treatment of the application of queuing theory to the courts has several substantive and methodological problems.

The first problem, of course, stems directly from the Gallas/Ryan perspective. Nagel asserts that the mathematical queuing formulas mean that delay can be reduced only by manipulating one of the specified variables. For example, he states that "arrival rates" can be reduced by diverting cases to administrative agencies or encouraging pretrial settlement; "service rates" can be increased by reducing the number of service stages (say, by eliminating grand juries for formal indictments) or by increasing the number of "servers" (by adding judges or quasi-judges).

What of the politics of such alternatives? Inevitably, the application of Nagel's "management" techniques have political or policy manifestations.[18] The use of administrative agencies in place of courts and the elimination of grand juries, for example, are fundamental political and/or constitutional questions which should not be determined by a supposedly value-neutral administrative or management process. I do not maintain that systematic analysis and research should not form the basis of policy decision-making by the appropriate bodies, but fundamental policy questions should not be cloaked in the garb of abstract technique and value-neutral "science."[19] Judges who resist "reform" efforts may not be resisting reform as such, nor modern management techniques, but rather "administration" that effects significant policy changes in the law or court system under the guise of objective "management science."

Oversimplification

A second substantive deficiency of Nagel's work is that it appears to treat court cases as if they were the uniform components serviced in a manufacturing or industrial process, which is the more common application of the techniques. In the application of queuing theory, for example, we recognize that a typical civil case may or may not reach a stage where it requires "service" (a hearing or trial in which a judge or judicial officer participates); if it does, the type and amount of "service" may vary. Conversely, a serious criminal matter is commonly required by rule to proceed through more clearly defined "service" stages and to do so within prescribed time periods. In essence, the variation in the types of litigation and the procedural diversity associated with it means that the application of some simple mathematical formula will appear inappropriate to the lawyer or judge.

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[15] Curiously, Gallas refers to the "complexity and dynamism of the problems" and argues for research that is sensitive to wider socio-economic forces as well as organizational and shop dynamics, yet he seems to be insensitive to how little his own analysis incorporates these concerns which I have loosely termed "context" (*supra* n. 1, at 38).

Gallas' 1976 article calls for an alternative conceptual design to state court administration structure based on the central theses... "that conditions affecting state court system structure and organization are *varied* and *contextual*." (*supra* n. 1, at 42, my emphasis).

[16] One final bit of evidence of the convolutions of logic which Gallas must accomplish to mount such a broad scale attack on court reform is his support for "acontextual" generalization in judicial administration research (generalization without reference to the specific reform goal or location). Gallas, *supra* n. 1, at 36. At the same time that he calls for more science in court administration research, he rejects the quantitative methods which are the heart of science. *Id.*, at 37.

[17] *See* Nagel, *supra* n. 3.

[18] The recommendation to add a specified number of judges or "servers" may be the only outcome of the application of queuing theory which is substantially administrative (management science).

[19] Only the most uninformed observers still believe, as Gallas implies (*supra* n. 1, at 37), that public administrators, whether city managers or court executives, make only management decisions having no political effect.

Queuing theory has been used to support complex systems where service occurs in stages and where a prioritization of service is established ("priority-discipline queuing models").[20] Nagel's explanation of the theory, however, fails to adequately acknowledge either the problems associated with procedural diversity, or the mathematical extension of the model to accommodate more complex systems. Judges and court administrators are likely to be left with the impression that operations research techniques ("scientific management") are tools that sound impressive but barely recognize the practical realities of courts.[21]

In summary, we can criticize Gallas for his premature judgment of court reform, for his failure to recognize the deficiencies of the court system that have been the impetus for court reform, and for his apparent refusal to recognize ways that systematic or "scientific" techniques can solve court problems. We can fault Nagel for his superficial prescription for "scientific management" of the courts.

But these authors do contribute to our understanding of reform because they raise three questions that must be answered in practical terms by court administrators: (1) Can we realistically appraise the "political" or policy ramifications of administrative reforms? (2) Can the administrative techniques we adopt take account of those "political" effects? (3) Can scientific management techniques appropriately be applied in a court setting? These questions are a challenge to court administrators, but in each case, the answer is "yes."

Fundamental policy questions should not be cloaked in the garb of abstract technique or value-neutral 'science.'

The 'political' impact of reforms

Gallas states that the single most important goal of court reform is "universal equity," which he defines as a uniform quantity and quality of services across jurisdictions within a state, and, logically extended, across states.[22] He sees unitary state funding of courts and weighted caseload analyses as administrative derivatives of this reform goal.

But Gallas has erected a straw man. The goal of reform efforts is not some abstract, "absolute equity" as he implies, but rather a relatively uniform quantity and quality of judicial services. Even within the past year, for example, evidence indicates that some litigants could expect to wait 24 months to have a civil case heard in one Minnesota county, while litigants in another county could proceed to trial within two months.[23] Though Minnesota historically has not had a serious criminal case backlog, the state instituted procedural reforms in 1975 to further reduce pretrial delays.[24] Research examining the effectiveness of those reforms found that six months after the rules of criminal procedure were enacted, the median time statewide between arrest and sentencing had decreased from 64.7 to 56 court days.[25] Nonetheless, wide variation in delay between counties continued to exist.[26]

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[20] For example, some types of cases, by law or rule, are mandated to receive the immediate attention of the court ahead of any other type of case previously at issue or calendared.

[21] In essence, I am agreeing with Charles Lindblom that there is (and ought to be) a direct relationship between the breadth of a problem or level of decision and the triviality of the "operations research" model which is applied. *See* Lindblom, *The Science of Muddling Through*, 19 PUB. AD. REV. (1959).

[22] Gallas, *supra* n. 1, at 30.

[23] MINNESOTA STATE COURT REPORT 1976-1977, Supreme Court of Minnesota, p. 27.

The Minnesota Constitution provides the fundamental right of each citizen—and therefore a constitutional obligation of the judiciary—is:

> (a) remedy of the laws from all injuries and wrongs which he may receive to his person, property, and character, and to obtain justice freely and without purchase; completely and without denial; *promptly and without delay*...(emphasis added)[27]

It has, of course, been the responsibility of the legislature and the judiciary to implement this guarantee.

Historically, this provision has had different meanings; even the most recent efforts of the Minnesota legislature to interpret the meaning of delay appear to contemplate only *reasonable* statewide equality.[28] The Court Reorganization Act of 1977 provided the outline of an administrative apparatus to deal systematically with the question of delay.[29] Undoubtedly, the contemporary public and legislative concern with more precise mechanisms for estimating existing backlogs and specifying acceptable delay is a result of four convergent historical forces:

- burgeoning civil litigation of markedly increased complexity;
- the propensity of legislatures to add new civil remedies;
- recent increases in criminal filings; and
- more intense competition for limited public fiscal resources.[30]

More complicated administrative tools

Under these conditions, it is not surprising that legislatures are providing the court system with more complicated administrative tools to respond to the changes in our increasingly complex and technological society. One need not be a modern day Luddite to lament the increasing complexity and the centralization of power in all spheres of public and private life. Yet it hardly seems fair to expect the judiciary to maintain an 18th century pastoral simplicity in the face of these changes, and it is hardly reasonable to hypothesize that our responses to change represent some naive aspiration towards absolute equity.

The Minnesota Court Reorganization Act of 1977 provides the administrative foundation needed by the judiciary to provide relatively equitable access to judicial services in light of the conditions we enumerated. But these reforms were adopted only as a result of public policy decisions: the administrative reforms have not *created* public policy, but vice versa. The political dialogue from which the legislation resulted certainly considered the political effects of the administrative reforms, such as those Gallas suggests (centralization of administrative power, for example).

The Reorganization Act was the result of over three years of deliberations by a Select Committee on the State Judicial System chaired by Associate Supreme Court Justice Lawrence R. Yetka. The committee included trial judges, attorneys, representatives of the League of Women Voters and state AFL-CIO, and various public officials including the state public defender, legislators, a former governor and other executive branch personnel. Monthly meetings, public hearings, and testimony by interested parties and experts in judicial administration were all part of the deliberative process.

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[24] *See* the Rules of Criminal Procedure, MINNESOTA RULES OF COURT, Supreme Court of Minnesota, St. Paul, West Publishing Company (1979).

[25] Thomssen and Falkowski, COURT DELAY IN MINNESOTA DISTRICT COURTS 25. Minnesota Crime Control Planning Board, (September, 1977).

[26] The analysis of variation in delay between counties in the 10-county sample was not reported in the report previously cited but was confirmed in conversations with the researchers.

[27] MINN. CONST. article I, section 8.

[28] *See, e.g.*, the interpretation of this constitutional obligation by Chief Justice Robert Sheran of the Minnesota Supreme Court in his "State of the Judiciary Message, 1978" delivered to the Minnesota State Bar Association, St. Paul, Minnesota, June 23, 1978.

[29] MINN. STAT. 480.15.

[30] At his August 7, 1979 address to the joint session of the annual meetings of the Conference of Chief Justices and the Conferences of State Court Administrators, Chief Justice Warren Burger suggested a joint study of alternative litigation patterns for complex civil cases. Burger urged that even before completion of the study, lawyers should waive juries and stipulate for trial by three-judge panels. For an excerpt of his address, *see* 5/1 STATE JUDICIARY NEWS (September, 1979)

A step toward equitable services

Records of the select committee's work indicate that its members were keenly aware of both the problem of more equitable statewide delivery of judicial services and the political ramifications of the associated reforms. In the first regard, for example, the committee heard testimony on January 21, 1976 from an expert on the development of state aid to education. The committee believed that the historical changes experienced by the school systems were similar to those confronting the courts. Without more state support for education, either the counties' tax burdens or the provision of services would remain inequitable. Indeed, the minutes of the committee show a continuing concern for making service delivery across the state more equitable without sacrificing local operational control—a common problem in most areas of state and national government in a federal system.

The committee's sensitivity to the political ramifications of reforms is apparent from its continuous reference to maintaining a decentralized, participatory management structure for the courts. A close reading of the committee's report and the findings and recommendations of the judicial officials from other states acting as consultants on the project, reveals that the reform measures were intended to establish such a scheme.[31]

- Operational control of the courts was made the responsibility of the local bench, the chief judges of the district, and the trial court administrators.
- The state-level management responsibilities of the chief justice and state court administrator were focused on those areas where statewide uniformity (personnel standards, records, information and statistics) or statewide purview (temporary judicial assignments) was necessary.

Of course, committee minutes do not necessarily reveal all the politics of the reform effort. Much more may be said by the legislative process in which the Select Committee's bill, hence the new administrative structure, was incorporated substantially intact into the law. It is doubtful, however, that the committee viewed its successful effort as more than a step toward more equitable service delivery, given the continued financial disparities associated with major county funding of the courts.

A continuing concern was to make services more equitable without sacrificing local control.

'Policy' in the techniques we adopt

In dealing with the problem of delay, Minnesota adopted both a statewide case-tracking information system and a weighted caseload system as administrative tools which are part of the reform package. The policy goal is to have the ability to estimate current backlogs precisely, to allocate judicial resources to obtain some acceptable level of delay, and to do it in the most cost-effective manner. Contrary to Gallas' assertion about "means overshadowing ends,"[52] the publicly determined "end" or goal is reduced delay and more equitable service, and the "means" chosen is the administrative and technical apparatus contained in the legislation.

One of the methods Minnesota has introduced is a weighted caseload system, which is actually a very simple concept. It posits that some method is necessary to compare the caseloads of different jurisdictions. If we simply compared the number of cases filed or cases disposed between jurisdictions, we would be comparing "apples" with "oranges." Since different types of cases require different procedures, judges spend varying amounts of time to dispose of different cases. There are, however, ways to weigh these differences.

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[31] The committee discusses the decentralized scheme in its unpublished report, "The Final Report of the Select Committee on the State Judicial System" (no date), especially pp. 5 and 9-17. *See also* Appendix C to that report, "Consultant Report on Administrative Structure," especially p. 43.

[52] Gallas, *supra* n. 1, at 27.

A measure that acknowledges the difference in work requirements considers the typical amount of judge-time required to dispose of a particular type of case, establishing a "weight" for each type of case. Knowing this factor, one can translate caseloads into equivalent units. When a caseload, stated in terms of weighted case units (minutes), is divided by the amount of time a judge typically has available to do case-related work, the result is the number of judges required to move the caseload.[33]

A common criticism of weighted caseload systems (WCL's) is that they encourage each judge to adhere to some "average" in the amount of time required to handle a case, and consequently, to ignore the increased quality some judges can provide through increased time and attention. Another criticism is that weighted caseload systems ignore the question of how efficient or productive a judge or number of judges may be, again institutionalizing "what is" rather than "what ought to be."

One argument concerns quality and the other quantity, but both are wrong to the extent that they misperceive what a weighted caseload system is designed to do. It is crucial to observe that the WCL concept, by definition, makes no assumption about quality of judicial effort or productivity. Weighted caseload systems simply allocate judgeships to make caseloads equivalent and reduce backlogs.[34]

The question of the *quality* of judicial service must be left to agencies other than court administrators. The weighted caseload system cannot, with any statistical confidence, determine whether a judge is "carrying" his caseload or carrying out his duties in a competent manner. These quality considerations must be regulated by professional guidelines—judicial standards, judicial discipline agencies, higher court review—and politically by the electorate.[35]

It is clear, nonetheless, that a weighted caseload system is an important administrative tool designed to distribute judicial resources equitably so that case processing delays become more nearly equal across court jurisdictions. It represents a huge step towards a more cost-effective judiciary where judgeships are created or eliminated based upon an empirical and systematic demonstration of need.

Tracking down delay

But assigning sufficient judges may not alone reduce delay. Other factors may contribute to a backlog. Suppose we consider two county court jurisdictions—one which tries a civil case within six months of notice of readiness and another which tries a similar case within 45 days. Several factors could cause the difference:

- relative differences in the size of the average caseload (filings);
- differences in the number of full-time sitting judges or judicial officers;
- differences in the "productivity" of judges in each jurisdiction (speed of rendering decisions or number of cases disposed per period of time assuming an equivalent caseload); and
- differences in calendaring techniques and continuance policies.[36]

In theory, were we to subtract the effect of these factors, the remaining time should be equivalent for the two counties. There should also be some "frictional" time or minimum time necessary to file, calendar, prepare, and possibly hear or try, and enter judgment on a case. Weighted caseload systems ignore all sources of delay except the relationship between the number of judges and the size of the case-

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[33] Weighting factors or weighted case units have been established by a number of both empirical and intuitive methods. Minneosta has chosen to measure case related judicial bench and chambers time. A weighted case unit is then a measure of judge-time (minutes) and is assumed to be, for analytic purposes, the same unit for all case-types. However, a unit presents a different porportion of each case-type.

[34] *See, e.g.*, the reports available from the states which have developed weighted caseload systems and some of the recent professional literature such as: Clark and Merryman, *Measuring the Duration of Judicial and Administrative Proceedings*, 75 Mich. L. Rev. 89 (1976) and comment b Doane at 100; Page, *Washington Weighted Caseload tem*, 1 4 St. Court J. 123 (1977); Doane, *The Effect of Weights on Perceived Court Workload*, 2 3 Just. Sys. J. 270 (1977);

Also, McDonald and Kirsch, *Use of the Delphi Method as a Means of Assessing Judicial Manpower Needs*, 3 3 Just. Sys. J. 314 (1978). *See also*, Doyle, *infra* n. 37 and the related article, Bray, *The weighted caseload system: It is not a faultless arbiter of judicial allocation decisions*, 62 Judicature 161 (1978).

[35] The existing level of quality in terms of the existing expenditure of time on cases is indeed assumed and "built-in."

[36] These are court controllable or court-related factors only; therefore, differences in such factors as attorney style are ignored.

The question of the quality of judicial services must be left to agencies other than court administrators.

load (stated in equivalent WCL units).[37]

Minnesota court administration has designed other management methods to deal more precisely with the components of delay. For example, the state has implemented a case-tracking management information system,[38] which predefines that point at which, by rule or law, the court's responsibility to move a case begins.[39] Regular and periodic reports remind judges and clerks of cases that are becoming stale. Additionally, a Trial Court Information System (TCIS) project is establishing model trial court management systems which will, among other things, update and improve the efficiency of calendaring and court management techniques which may have contributed to delay in case processing. Indeed, by managing available resources more effectively we may preclude the need for additional judgeships to meet prescribed case-processing time standards.

Soon, Minnesota intends to extend its weighted caseload system and case-tracking management information system with the "operations research" or management science techniques which Nagel describes (specifically, queuing theory). But those efforts will be undertaken with a sensitivity to the court environment and qualitative issues which are the central concerns of both the critics of management science and the court reform movement.

Fitting techniques to reality

In a real life setting, delay is probabilistic rather than deterministic; case filings are variable, and over small units of time more "random" than fixed. Queuing theory can accept the variability of real life situations and provide orderly and systematic guides for handling what is otherwise unmanageable.

The weakness of Nagel's suggested application of queuing theory is that it is not sensitive to the peculiarities of the court environment where "cases" are both "apples" and "oranges" in terms of procedural diversity. The development of queue theory in a manufacturing environment allows more straightforward application with useable results. Unfortunately, in order to properly incorporate the multiple and variable "service stages of the court environment into queuing theory, one must assume that the "servicing" of each case takes comparable units of effort, or one must develop an incredibly complex extension of queue theory math.

However, the availability of both a case-tracking management information system which tracks and times significant court activities on each case, along with a weighted caseload system, allows a more simple application of queuing methodology (See Figure 1). On the basis of the data from a weighted caseload system and case-tracking information system, we can actually eliminate the effect of the procedural diversity in the "service process."

Through mathematical queue models, we can relate expected arrival rate and expected or average service rate (speed of service and num-

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[37] Some work, as an adjunct of weighted caseload analysis, has been completed on the question of "productivity." *See* Doyle, *Comparing court productivity*, 61 JUDICATURE 416 (1978).

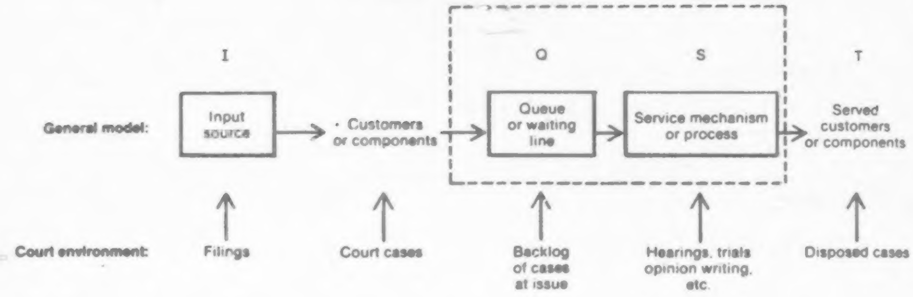
[38] Civil, probate and family cases have been tracked for over a year. Serious criminal cases have been tracked by another agency and will be tracked by the Supreme Court Information Systems Office beginning in March, 1980. Most other case types will begin to be tackled in 1980.

[39] Minnesota assigns specific responsibility to district and county courts to move a criminal case upon first appearance. *See, e.g.*, MINN. R. CRIM. P. 4.02, Subd. 5 (hours from arrest to first appearance); Rule 5.03 (days to first appearance in district court for arraignment); Rule 8.04 (days from first appearance to omnibus hearing); Rule 11.10 (days to trial upon demand). Rule 34.01 establishes the method for computing time.

MINN. STAT. 244.10, subd. 1, part of the recent legislation establishing sentencing guidelines, prescribes the number of days from conclusion of sentencing to entry of an order.

On the civil side, MINN. R. CIV. P. 38.03 says that the calendaring of a case must follow filing of a note of issue. The law and rules governing juvenile court and probate court are far less rigorous, however.

Figure 1
A basic queue model



ber of servers) to predict the time a customer would be expected to wait to complete service (to wait in "Q" in our model, or total time from "Q" to "T"). We can make the basic model more complex by assuming more than one service channel (more than one judge), by introducing multiple and variable staging of service (different court procedure), or by assuming a service discipline other than a simple "first-come, first-served" process.[40]

A final complication of a court application is identifying the pool of "customers" for the "input source." In civil cases, for example, a large proportion of cases which are filed never enter the "queuing system"; they are resolved before the court becomes extensively involved.

Point of entry

The most significant event in the conceptual design of the Minnesota statewide case-tracking information system is the point at which the court is deemed by rule or statute to have responsibility to move a case that has been filed. This point, of course, varies from one type of case to the next. The information system allows the identification of any case (regardless of type) which has entered the queuing system and the time of that significant event of court responsibility. Therefore, the system overcomes the problem of specifying the "pool of customers" and timing their entry into the system. They enter the system when the law specifies that the court is responsible.

Mathematical models have been formulated to handle queuing systems with more than one server (such as the judges in a court application), but the problem of variable and multiple stages (procedural diversity) remains. If the data from the weighted caseload system and case-tracking information can overcome this problem, a statewide court system application of this management science technique will be useful and appropriate. And by restating the customer unit as *weighted case unit* rather than single case unit, we can virutally eliminate the effect of variable service needs.

For example, if it is necessary to know the mean service rate (MSR) as part of a formula to calculate the number of servers necessary to achieve a specified expected time in the "service system," then the MSR is the average number of units serviced in one unit of time which becomes the average number of *weighted case units* disposed per month. Likewise, the number of servers (S) can be restated in terms of "judge work minutes" from the weighted caseload analysis of the number of minutes a judge typically has available to do case-related work. By restating all applicable factors in weighted case units (customers) or judge work minutes (servers) we can specify any acceptable length of delay (e.g., time from the beginning of court responsibility to disposition) or we can determine size of case backlog (in weighted case units) and solve the equation for the number of full-time equivalent judges necessary to achieve a specified case backlog, or delay standard, in any court.

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[40] The first two assumptions are clearly necessary in a court application; the third may be ignored if the vast majority of cases are treated in accordance with the more simple service discipline assumption.

Thus, the queuing methodology can be appropriately applied to the court setting because the weighted caseload system makes it mathematically possible to compare a court work burden composed of different types of cases with varying processing needs. We need not further complicate the mathematical model to account for variable and multiple service staging. "S" in our diagram can remain a "black box."[41]

Minnesota's answer

Has Minnesota elevated technique over substance, the subject for which Nagel has been criticized? No, the techniques which were chosen to equalize and minimize case delay were adopted with a sensitivity to the qualitative dimensions of the problem. Quantitative judgments about the allocation of judicial resources will be made on a regional basis,[42] since the mathematical techniques do not support discrete, county-level discriminations of need.[43] The statewide data and scientific techniques will support the recommendation of regional judgeship allocations to the legislature.

It remains the function of the legislature however, to establish this allocation, and the function of the chief judges, their local administrative apparatus, and the regional bench to establish specific deployment patterns. These decisions, made within the resource parameters established by the legislature, are intrinsically qualitative. Specific deployment decisions can by made, for example, on the basis of community expectations, specialization of the bench, and other regional factors which can never be part of an objective calculus.

These management tools can make distinctions between what should be 'political' and what should be administrative.

The administrative tools and apparatus Minnesota is developing are clearly the result of the political process and the contemporary legislative definition of the constitutional right to equitable and speedy legal remedy. These management tools, when applied with sensitivity to the court environment, can and do make distinctions between what should be "political" and what should be administrative. The techniques are *not* designed to judge or measure the quality of judicial service beyond the simple guarantee of reasonably speedy service: that evaluation of normative quality has been left to the electorate and other political and professional review mechanisms.

It is understandable that many lawyers and judges are troubled by the increasing technical complexity of court management and the size of administrative structures. They are equally concerned by demands for the increasing complexity of "operations reasearch" or "management science" when such calls ignore the realities of a court application and cloak significant political or constitutional issues in the garb of "objective" and value-free "science." What both Gallas and Nagel may have overlooked is that that those involved in court administration are far more sensitive to these kinds of issues than the literature suggests. ☐

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[41] Of course, an assumption is made that the weighted case units, once derived, are not probabilistic.

[42] The state is composed of 10 judicial districts ranging from 14 to 37 judges of county, municipal and district court.

[43] The system, for example, will not support the oversight of an individual judge to determine whether he is "carrying" an adequate caseload. The precision of the staffing recommendation is directly related to the size of the jurisdiction for which the estimate is made. Therefore, estimates will be by judicial district.

The Most Dangerous Branch:

The Supreme Court vs. the Constitution

'Under the aegis of both Earl Warren and Warren Burger, the Supreme Court has threatened the U.S. Constitution in a manner not possible by another branch of government, and to a degree undreamt of by Hamilton. . . . The Warren and Burger Courts have called into question the Court's very legitimacy as an institution of constitutional government.'

By EARL P. HOLT III

In No. 78 of *The Federalist Papers*, Alexander Hamilton remarked that since the Judiciary commands neither the Executive's "sword" nor the "purse" of the Legislature, it will therefore "always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." Despite his genius, Hamilton was wrong.

Under the aegis of both Earl Warren and Warren Burger, the Supreme Court has threatened the U.S. Constitution in a manner not possible by another branch of government, and to a degree undreamt of by Hamilton. In a most fundamental sense, the Warren and Burger Courts have called into question the Court's very legitimacy as an institution of constitutional government.

For 30 years the Court has made a mockery of constitutional limits on the Judiciary by acting as a "super legislature," or as many critics suggest, "a continuous constitutional convention."

In the opinion of America's preeminent constitutional historian, Harvard's Raoul Berger, the Court has become "a committee which has taken the deciding of momentous national issues out of the hands of the people." Indeed, it has become the ultimate arbitrator of every major public issue from abortion to forced busing, and from capital punishment to public school prayer.

"In a government of limited powers" notes Prof. Berger, "It needs always to be asked: what is the source of powers claimed?" (*Government by Judiciary*, Harvard University Press.)

Under a written Constitution with carefully delineated doctrines of "separated powers" and "checks and balances," a branch of government must carefully justify its exercise of power to be perceived as acting within the legitimate bounds of its authority. Only then may the public be satisfied that theirs is truly a government based on rule of law rather than rule by men.

Recognizing this principle, the Constitution's framers painstakingly distinguished judicial from legislative functions and provided for their separation.

That justices could *make law* to effect social change as legislatures

routinely did, was a notion completely alien to colonial experience. This is indicated by Hamilton's observation in *Federalist No. 78* that the judiciary was to serve as "bulwarks of a limited Constitution against legislative encroachments," but could "take no active resolution whatsoever."

Moreover. the framers specifically rejected judicial law-making at the Constitutional Convention of 1787, when they discarded a proposed "Council of the Revision"; intended to empower a supreme judicial body with the capacity to modify and revise legislation rather than merely determine its constitutionality.

As Yale Law Prof. Charles L. Black has observed, "the function of the judge was placed in sharpest antithesis to that of the legislature."

Consistent with the principle of "separated" powers, a number of approaches exist whereby the Court can justify its decision-making and ensure that it is *applying* rather than *creating* constitutional doctrine. Again, *Federalist No. 78* is instructive: "To avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents. . . ."

Uproar over the Warren and Burger Courts' "revolution" has stemmed from their arrogant rejection of these accepted principles of constitutional interpretation.

Clear Text of the Constitution: When constitutional text speaks directly to a particular issue before the Court, theoretically, this situation should pose the least difficulty to resolve. In light of this principle of a "clear" case, the Warren Court's 1969 decision in *Powell v. McCormack* is instructive:

Article 1, Section 5, Clause 1 of the Constitution provides that "each House shall be the judge of the . . . . Qualifications of its Members. Clause 2 immediately continues: "Each House may . . . punish its Members for disorderly Behavior, and, with the concurrence of two-thirds, expel a Member." (Note that no mention is made of a role for the Court in either determination.)

Nonetheless, in *Powell*—notable for creating a precedent for Supreme Court "supervision" of Congress—the Warren Court invaded the province of congressional business, and overturned House Resolution No. 278 which "excluded" Congressman Adam Clayton Powell, by a vote of 307 to 116, for flagrant misuse of public funds.

Although minor procedural technicalities were involved (the Resolution "excluded" rather than "expelled" Powell), Powell's conduct in light of the clear and unambiguous constitutional text would seem to imply a markedly different outcome.

Similarly, in *Furman v. Georgia* (1972 and subsequently modified), the Burger Court found capital punishment "cruel and unusual," and therefore in violation of the 8th Amendment. Yet the Constitution specifically *acknowledges* federal and state authority to execute criminals *in at least four places*, providing certain procedural safeguards are observed.

For example, the 14th Amendment cautions that no "State [shall] *deprive any person of life* . . . without due process of law."

Moreover, the 5th Amendment (applicable to the federal government) provides: "No person shall be held to answer for a *capital* . . . *crime*, unless on . . . indictment of a Grand Jury." It continues, "nor shall any person be subject . . . to be twice *put in jeopardy* of life . . . nor be *deprived of life* . . . without due process of law." (Emphasis added.)

How could the Constitution have been said to forbid capital punishment when it specifically acknowledges it, and indicates the conditions under which it is permissible?

Intent of the Framers: When the issue before the Court is not a "clear" case, as occurs where the applicable constitutional passage is ambiguous, the Court has traditionally looked for guidance to the "intentions" or "spirit" of its framers at the time of its drafting.

This ancient judicial practice serves to enhance the legitimacy of judicial decision-making by minimizing the opportunity for judges to arbitrarily inject their personal predilections into a decision. Its indispensability for a system based on rule of law is suggested in the following statement of James Madison:

". . . [if] the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."

Needless to say, the Warren and Burger Courts have shown little interest in this juridical technique, preferring instead a "resort to bad legislative history and strained reading . . . better justified by . . . contemporary moral and political ideals not drawn from the constitutional text." (Thomas Grey, 27 *Stan. Law Rev.* 703.) Their school prayer and "affirmative action" decisions reflect this.

For instance, the notion that citizens should be equal before the law is a principle so firmly embedded in Western legal tradition, it is almost beyond question. For this reason, the 39th Congress (1865-1867) drafted the 14th Amendment's "equal protection" clause, which decrees that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

In the words of Charles Sumner, a

(Continued on page 12)

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leading Senate spokesman at the time, the equal protection clause was intended to ensure "the shield of impartial law." After exhaustive research, Prof. Raoul Berger concludes "equal protection" was intended "to obviate discrimination," so that existing laws "would treat a black no differently than a white." (*Government by Judiciary*, p. 191.)

Yet, in *Bakke* v. *The Board of Regents* (1978), the Burger Court specifically approved state university-operated preferential admissions policies for minorities, thereby *condoning discrimination based on race.* (Although the Court decided in favor of plaintiff Bakke—a white denied entrance to a University of California medical school in favor of far less qualified minority applicants—it did so only because it objected to the particular plan affecting Bakke.)

Ironically, the Court "justified" its decision on the basis of the equal protection clause. Apparently overlooked is the fact that preferential treatment of any kind must necessarily work to the disadvantage of those *not* so privileged, and is decidedly *unequal* treatment.

For the Court to imply that preferential treatment of certain privileged races does not do violence to the obvious and historical meaning given "equal protection" by its framers, is to engage in semantical deviousness suggestive of George Orwell's *1984*.

Analogously, both Warren and Burger Courts have struck down state or local laws permitting recital of prayers in public school classrooms. (The leading case is *Engel* v. *Vitale*, 1962.) In each instance, the Court has resorted to a legislative "history" of the 1st Amendment which is claimed to support a doctrine of "separation of church and state."

> **"Separation of church and state" is an expression not found within the Constitution, but rather, a catch-phrase used to justify a non-existent doctrine which the amendment's framers would find repugnant.**

Of relevance is the 1st Amendment's "establishment" clause, worded as follows: "Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof." Constitutional scholars overwhelmingly recognize the amendment's true purpose to be a prohibition against the establishment of an *official, state religion*, with its attendant religious persecution.

Congressional debate preceding the 1st Amendment's adoption clearly indicates its framers' desire to prohibit official acts preferring one particular denomination over all others, but thoroughly disproves any suggestion that their intent was to create a purely secular document. (See Michael Malbin, "Religion and Government," American Enterprise Institute.)

Even a generous assessment of the school prayer decisions following *Engel*, indicates the Warren and Burger Courts have regularly borne judicial false-witness against the 1st Amendment's framers.

Mr. Holt believes the Supreme Court under (left to right) Earl Warren and Warren Burger has been a threat to—and not a defender of—the Constitution. Constitutional expert Raoul Berger asserts the Court has become "a committee which has taken the deciding of momentous national issues out of the hands of the people." In a precedent-making decision, the High Court invaded the province of congressional powers in the matter of "excluding" former Rep. Adam Clayton Powell from the Congress.

Decisions of Prior Courts: The principle that the Court is obligated to follow the precendent of prior Court decisions was simply dimissed by both Warren and Burger Courts. As Prof. Leonard Levy remarked, "...the Burger Court no less than the Warren Court displayed an audacious disregard for and circumvention of precedents, clearly revealing its own values and policy choices."

With the Warren Court's decision in *Green* v. *County School Board* (1968), for the first time in U.S. history, the Court "discovered" an *affirmative duty to integrate* the public schools.

Whereas *Brown* v. *Board of Education* (1954) had merely outlawed state law-created segregation in the public schools—a decision easily justifiable on the basis of "equal protection"—in *Green*, the Court found public school segregation illegal, even when it resulted entirely from the free choice of black and white parents and students, and in no way involved state laws.

Green is often cited as a turning point, after which the Warren and Burger Courts became increasingly preoccupied with achieving certain "social-engineering" schemes (i.e., so-called "substantive" equal protection) and less concerned with guaranteeing procedural fairness, as the Constitution's framers intended.

Precedent may consist not only of a body of decisions, but also its absence, indicating a judgment by prior Courts that a particular doctrine or right doesn't exist where not delineated.

Hence, for 182 years prior to the Burger Court's decision in *Roe* v. *Wade* (1973), the authority of individual states to regulate abortion was unquestioned, and presumed to fall under the 10th Amendment which "reserve[s] to the states...powers not delegated to the United States."

By inventing a new "fundamental right" to abortion, the Court overruled abortion statutes in all 50 states and also ignored the traditional test of a state statute's constitutionality; whether it bears a "rational relation" to a "compelling state interest," as state abortion laws unquestionably did.

Yale University Law Prof. John Hart Ely—a liberal and former law clerk of Earl Warren—even went so far as to concede that *Roe* "is *not* constitutional law and gives almost no sense of an obligation to try to be."

That the Warren and Burger Courts have usurped legislative powers by rejecting the accepted principles of constitutional interpretation is obvious, and conceded even by Warren and Burger Court apologists. In so doing, these Courts have generally attempted to justify their decisions on the basis of an earlier-discredited "Natural Law" philosophy of judicial decision-making.

Natural Law embodies the quaint notion that justices are somehow able to "divine" an underlying *consensus* on significant public issues. However, as Dean Roscoe Pound observed, Natural Law is merely a facade permitting decisions which are "purely personal and arbitrary."

Evidence that Warren and Burger Court decisions were exactly that—purely personal, arbitrary, and by no means a consensus—is reflected in numerous public opinion surveys taken subsequent to these decisions.

In the wake of the Court's abolition of capital punishment in *Furman*, 35 state legislatures enacted new capital punishment statutes, and a 1976 Gallup poll found 65 per cent of Americans favor capital punishment for the crime of murder.

Another Gallup poll found 83 per cent of Americans opposed to preferential treatment for minorities, an opinion the poll found echoed by 60 per cent of minorities themselves.

Frustrated by the Court's decision in *Engel*, 78 per cent of U.S. parents of school-age children were found by a 1978 Gallup poll to favor public school prayer, and a 1981 CBS poll had nearly identical results, with 76 per cent of such parents favoring prayer in public schools.

Numerous Gallup polls throughout the 1970s have found Americans opposed to forced busing by majorities of 73 per cent and more, while a 1981 CBS/New York *Times* poll found 54 per cent of black respondents also opposed to busing.

Finally, a 1981 CBS poll found 63 per cent of Americans opposed to abortion.

In terms of their actual impact on public policy, it is difficult to conclude that the Warren and Burger Courts have been other than singularly disastrous; rarely has the nation experienced such polarization and social upheaval at the hands of the Court. In producing these results, the Warren and Burger Courts have vindicated the viewpoint of former Justice Robert Jackson, who had earlier commented: "...time has proved that [the Court's] judgment was wrong on most of the outstanding issues upon which it has chosen to challenge the popular branches."

Thus, a rise in violent crime accompanying the near-disappearance of capital punishment since *Furman*, is a relationship clear to all but the Court.

By condoning preferential treatment based on race, the *Bakke* decision threatens to stir up embers of racial animosity among even those once sympathetic with the black civil rights movement.

Those innocent, brief moments of daily prayer have disappeared from the public schools, to be replaced by surreptitious marijuana and alcohol consumption, gang fights, and promiscuity.

Forced busing compelled by *Green* and subsequent decisions is a treacherous waste of time and public funds, has nearly destroyed the neighborhood schools concept, and is therefore often cited as a major factor in the decline of the public schools.

Finally, by valuing a mother's "convenience" over the life of the innocent unborn in *Roe*, the Court has encouraged disrespect for human life, and may well have precipitated the epidemic of child abuse that corresponds so startlingly with that now-infamous decision.

* * *

In his monumental study of Supreme Court usurpation of power via the 14th Amendment, *Government by Judiciary*, Prof. Berger identifies this paramount threat to American constitutional democracy and rule of law:

"No power to revise the Constitution under the guise of 'interpretation' was conferred on the Court; it does so only because the people have not grasped the reality—an unsafe foundation for power in a government by consent." ■

COURT REFORM AND ACCESS TO JUSTICE: A LEGISLATIVE PERSPECTIVE

Robert W. Kastenmeier*
Michael J. Remington**

Responding to the increasing caseload of the courts, members of the judicial branch and the bar have dominated the discussion of reforms designed to facilitate the proper functioning of the nation's judicial system. In this article, Congressman Kastenmeier and Mr. Remington present a view from the legislative branch of the essential elements of judicial reform. Arguing that expeditious resolution of disputes is central to the right of access to justice, the authors survey the major legislative proposals before the Ninety-sixth Congress and offer their suggestions for improving the delivery of justice.

> . . . and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite the same degree as the courts.[1]

Introduction

The federal judicial system has in the past served admirably and effectively to meet its constitutional and statutory mandates. The general mandate of this system, and indeed of any court system, is to secure "the just, speedy and inexpensive determination of every action."[2] In this clear statement from the Federal Rules of Civil Procedure, there are three basic themes: time, economy, and quality of justice. Today, the federal judicial system is beset by problems in all three of these areas: delay caused by rising caseloads, complex procedures, irrational organization, and insufficient support services; spiraling costs caused by inflation, overly litigious lawyers, and un-

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[1] Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904) (Holmes, J.).

[2] Fed. R. Civ. P. 1; *see also* Fed. R. Crim. P. 2.

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justifiable expenses; and unfair decisions caused by the pressures placed on judges who must cope with the rising torrent of litigation.[3] The problem of delay is not a new theme in the administration of justice, nor is it a problem peculiar to this country.[4] In 1215, King John in the Magna Carta promised that "To no one will we . . . delay right or justice."[5] But in 1839 an English legal commentator complained that this had become an empty promise: "No man, as things now stand can enter into a Chancery suit with any reasonable hope of being alive at its termination, if he has a determined adversary."[6] Jeremy Bentham, one of the great law reformers, referred to delay as one of the "burdens of judicial procedure."[7]

Bentham's statement is of as much validity today in the American judicial system as it was in nineteenth-century England. Several conferences and commissions[8] and a Department of Justice report[9] documented this fact and have discussed its effects on litigation in the federal judicial system. If a litigant who has had his rights abused must wait three or four years for relief — as too often is the case in many state and federal courts — that person is denied effective access to justice.[10] What good is the sacred writ of habeas corpus if the petitioner must serve most of his sentence before a determination of his rights? What good are Social Security benefits for the elderly or the disabled, if they must wait years for a judicial determination of their disabilities?

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[3] *See, e.g., Hearings on the State of the Judiciary and Access to Justice Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Hearings on the State of the Judiciary*], U.S. DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 1-4 (1977) [hereinafter cited as NEEDS OF THE FEDERAL COURTS]; Addresses to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, *reprinted in* 70 F.R.D. 79 (1976) [hereinafter cited as Pound Conference]; H. FRIENDLY. FEDERAL JURISDICTION: A GENERAL VIEW 3-4 (1972) [hereinafter cited as FRIENDLY].

[4] *See, e.g.,* Damaska, *A Foreign Perspective of the American Judicial System* in STATE COURTS: A BLUEPRINT FOR THE FUTURE 237, 238 (T. J. Fetter ed. 1978); *see* the six-part series of articles written by the French Minister of Justice Alain Peyrefitte. *Pour une justice moderne,* Le Monde, Jan. 9-15, 1979.

[5] MAGNA CARTA, ch. 40 (1215).

[6] Cited in Lord Bowen, *Progress in the Administration of Justice during the Victorian Period* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516 (1907).

[7] 2 THE WORKS OF JEREMY BENTHAM 19 (J. Bowring ed. 1843). About the same time, Alexis de Tocqueville noted in his historical analysis of the *Ancien Regime* in France that "litigation was costly, complicated, and unconscionably protracted." DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION 116 (S. Gilbert trans. 1955).

[8] *See, e.g.,* A.B.A., Report of Pound Conference Follow-up Task Force, *reprinted in* 74 F.R.D. 159 (1976) [hereinafter cited as Pound Conference Follow-up Report]; Pound Conference, *supra* note 3; U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter cited as HRUSKA COMMISSION]; U.S. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND REPORT].

[9] NEEDS OF THE FEDERAL COURTS, *supra* note 3.

Similarly, justice that costs too much is not effective or just. It does not take an economist to understand that where the amount in controversy is less than the cost of resolving the dispute, there is no effective access to justice. With spiraling legal fees and costs of litigation, not to mention increasing costs related to running American courts which are borne by the taxpayer, the effective resolution of "minor" disputes suffers. In Los Angeles, a major law firm tells clients that it cannot provide quality legal representation in suits involving under $100,000.[11] This may be somewhat exaggerated, but it starkly suggests that our existing system may not be available for individuals with legitimate claims involving relatively small amounts of money.

The sad fact today is that the twin demons of cost and delay are asphyxiating our courts, both state and federal. This has pernicious effects on the quality of justice rendered by these courts. In spite of the fact that courts have established a strong reputation as fair and impartial arbiters, congestion and costs are having a deleterious effect on their work product.[12] Although fairness is not easily quantifiable, it is apparent to even a casual observer that judges are being forced to adjust their work habits to meet the mounting pressures. They render many decisions from the bench, without giving their reasons and without the benefit of oral argument.[13]

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[10] On June 30, 1978, 16,054 civil cases had been pending in federal district courts for three years or more. This represents a shocking 10.2% of the total pending civil case load (excluding land condemnation cases) and is a 35.6% increase over the previous year. [1978] Dir. Ad. Off. U.S. Cts. Ann. Rep. 68 table 22.

[11] *Hearings on the Dispute Resolution Act (S. 957) Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 32 (1978) (statement of Ronald Olson).

[12] *Hearings on the State of the Judiciary, supra* note 3, at 242-54 (statement of Robert H. Bork).

[13] One circuit court of appeals decides over half of its appeals without benefit of

This contraction of quality has not gone unperceived by either the public or those knowledgeable in the law. A recent survey — complimented for the conscientious manner in which it was conducted[14] — concluded that the general public and local leaders are dissatisfied with the performance of our judicial institutions.[15] Only 29 percent of the general public indicated a high degree of confidence in the federal courts;[16] only 23 percent had great faith in the state courts.[17] The survey also found that the more knowledgeable and experienced a person, the more likely that he would have an unfavorable opinion of courts.[18] The seriousness of the problem, in the public's mind, is reflected in the finding that Americans consider efficiency in the courts equally important as pollution, and more important than white collar crimes, ability of schools to provide a good education, and threat of war.[19] The public's high level of concern is matched by a willingness to commit resources to solving the problems. Seventy-four percent of those polled would commit their tax dollars to getting the best possible people to serve as judges; 66 percent want to develop ways to settle minor disputes without going through formal court proceedings; 64 percent would make certain that courts have adequate facilities for those who must use them.[20]

Confronted by this evidence, the political question arises: what is the United States Congress to do about problems affecting our justice system. Initially a general or philosophical approach is needed. Then, a specific legislative agenda can be formulated to complement the theoretical framework.

First, justice is indivisible. Under our constitutional and

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hearing oral arguments. Hayworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, 281.

[14] *See, e.g.*, Friendly, *Judging the Judges*, in STATE COURTS: BLUEPRINT FOR THE FUTURE 70 (T.J. Fetter ed. 1978).

[15] *See* the study conducted by prestigious public opinion analysts, Yankelovich, Skelly and White, Inc., *The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders*, in STATE COURTS: BLUEPRINT FOR THE FUTURE 5-69 (T.J. Fetter ed. 1978); *see id.* at 51 table V.1.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 46-49 tables IV.18-IV.23.

[19] *Id.* at 32 table IV.1.

[20] *Id.* at 56 table IV.1.

federal system, the legislative, executive, and judicial branches of both the state and federal governments must work together to ensure respect for the Constitution and to promote fair and equal application of the laws of the United States.[21]

Second, we are dealing with a total environment. Court-related problems are not merely lawyer problems, or judge problems, or law enforcement problems, they are people problems.[22] Law and government work together on behalf of the citizens and residents of this country. Without their support, democratic institutions lack all authority to act. In this regard, the needs of the poor, powerless, and underprivileged — individuals whose desires have generally been underrepresented in the legislative and executive branches and whose rights often have been vindicated in the anti-majoritarian judicial branch — are of utmost importance.[23]

Third, the crisis in the federal courts is essentially a resource allocation question. We are dealing with a finite resource which must be allocated to those needing it the most in our society. Four responses are available to the legislator and one further response is available to litigants and their legal counsel:

(1) *Expansion* of the resource;
(2) *Substitution* for the scarce resource by redirecting litigation to alternative dispute resolution institutions, such as

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[21] U.S. Const. art. VI, § 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[22] Joiner, *Lawyer Attitudes toward Law and Procedural Reform* in Court Congestion and Delay 60 (G. Winters ed. 1971).

[23] *See, e.g.*, the admonition of Judge A. Leon Higginbotham, Jr., to the participants at the Pound Conference:

> I wish this conference well. I hope it is successful. But I also hope that the fruits of its success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this — the weak, the poor, the powerless, those who, whether they like it or not, are inevitably involved in the process and the system that we are privileged to preside over. . . . Let us not forget them. Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.

A. L. Higginbotham, The Priority of Human Rights in Court Reform, Pound Conference, *supra* note 3, at 159.

state courts, magistrates, arbitrators, mediators, ombudsmen, or neighborhood justice centers;
(3) *Conservation* of the resource by eliminating inefficiencies or by simplifying procedures and threshold barriers;
(4) *Rationing* the resource by limiting availability to all litigants or by barring access altogether for specific groups of individuals;[24] and
(5) *Avoidance* of the resource entirely.[25]

In using these techniques, members of the House and Senate can strive for a rational, consistent, economical, and comprehensible judicial system. We can be vigilant in avoiding contradictory and overlapping legislation. And we can set priorities and use considered judgment to solve court-related problems and promote access to justice.

In formulating a national program for the delivery of justice, not all efforts should be concentrated on any one of the five techniques, nor should they be focused entirely on the federal judiciary.[26] The state courts play an extremely important role in our justice system. They are closer to the people and their problems; there are fifteen times the number of state judges as federal; the state judges are frequently more flexible and innovative than the article III federal judiciary.[27] Let us now turn to the five available responses to the ubiquitous overload in our judicial system and its insidious effects on that system.

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[24] The terminology for the first four types of responses was used by Professor Burt Neuborne who eloquently represented the views of the American Civil Liberties Union during the House Hearings on the State of the Judiciary and Access to Justice. *Hearings on the State of the Judiciary, supra* note 3, at 112-18.

During these same Hearings Judge Shirley Hufstedler seconded Professor Neuborne's analysis by explaining that Congress "must match the demands against the resources, assign priorities based upon an evaluation of those needs, and ration access accordingly." *Id.* at 149. *See generally* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 339 (1973); Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971); Hazard, *Rationing Justice*, 8 J. L. & ECON. 1 (1965).

[25] This last technique recognizes that the spectrum of the available processes for dispute resolution stretches all the way from formal adjudication to total avoidance. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 114 (1976).

[26] *Hearings on the State of the Judiciary, supra* note 3, at 112, 177 (statements of Burt Neuborne and Robert J. Sheran); *see generally*, Sheran & Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1 (1978) [hereinafter cited as *Sheran & Isaacman*].

[27] Address of Warren E. Burger to the Second National Conference of the Judiciary (March 19, 1978), Williamsburg, Va., *reprinted in* STATE COURTS: A BLUEPRINT FOR THE FUTURE 284, 285 (T.J. Fetter ed. 1978); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

I. EXPANSION

One of the most popular suggestions for reform is expansion of the number of judges. In this context, the Ninety-fifth Congress passed legislation creating 117 new district judgeships and 35 new circuit judgeships.[28] Today, there already are several proposals to create still more new districts and further judgeships.[29]

In its report, the House Judiciary Committee found that the federal judiciary cannot be expanded indeterminably without impairing its high quality.[30] What has been accomplished by a relatively small and intimate group of individuals will not necessarily be accomplished by a large bureaucracy of faceless federal judges. For one thing, it is likely that recruitment of qualified individuals will be made more difficult as the federal judiciary increases in size. Equally important, expansion of the resource does not cure the malady of court overload.[31] Rather, as in the energy area, expansion has its limits as a solution. Lawyers and litigants will seize upon the time of the new judge in town, who will quickly become overloaded. Already, for example, the Department of Justice has asked Congress for more prosecutors to pursue cases in the new courts.[32] Thus, a new judgeship — important as it may be to protecting federally created rights and to enforcing federal laws — is a bit like a parking lot built to solve the problem of traffic congestion in an expanding downtown area. Soon the lot will be full.

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[28] Pub. L. No. 95-486 § 1(a), § 3(a), 92 Stat. 1629-30, 1632 (1978). This bill was approved by the President on October 29, 1978.

[29] *See* H.R. 2505, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1003 (daily ed. Feb. 28, 1979), a bill to create a new judicial district for the southwestern district of California; H.R. 3714, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H2354 (daily ed. Apr. 25, 1979), a bill to create a new judicial district for the southwestern district of New York.

[30] *See* H.R. REP. NO. 95-858, 95th Cong., 2d Sess. (1978). This argument was first made by Felix Frankfurter in 1928. He observed:

> A powerful judiciary implies a relatively small number of judges. Honorific motives of distinction have drawn even to the lower federal bench lawyers of the highest quality and thereby built up a public confidence comparable to the feelings of Englishmen for their judges. Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions. . . .

Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928). It must be admitted that Frankfurter's bald assertion — for the last sixty years uncritically accepted by legal commentators — has never been supported by empirical evidence.

[31] *See* H.R. REP. NO. 95-893, 95th Cong., 2d Sess. (1978).

In addition, creation of a federal judgeship is an irreversible decision. A judge appointed pursuant to article III of the Constitution possesses lifetime tenure and therefore is removable from office only by impeachment. A decreasing caseload is clearly not an adequate reason to abolish a judicial position.[33] Moreover, the federal judiciary is a pyramid, with the district courts forming the base, the circuit courts in the middle and the Supreme Court at the apex. Creation of new judgeships — always at the district and circuit layers and never at the apex — results in funneling more and more cases up the appellate structure and ultimately to the beleaguered Supreme Court.[34] Thus, if something is not done for the High Court, such as providing it with more staff or abolishing its mandatory jurisdiction,[35] its burdens will grow. Already, most *certiorari* petitions are handled by law clerks and are never seen by all the justices. The growing burden on the Court either will cause it to act to control the flood of cases flowing in or will reduce respect for that institution when it is unable to maintain expected levels of excellence.[36]

Large numbers of lower court judges also produce inconsistent and conflicting decisions, ultimately breeding more litigation as astute lawyers ask the appellate courts for resolution of the conflicts.[37] In brief, it is rather shortsighted of those who constantly advise creating new judgeships as a sole solution to court overload not to come forward with further solutions for the secondary problems which necessarily arise. It is imperative, therefore, that other techniques be applied as well.

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[32] 1980 Authorization Request, U.S. Department of Justice (unpublished).

[33] For further discussion of this important consideration, *see Sheran & Isaacman*, *supra* note 26, at 11.

[34] *See* Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971). Judge Hufstedler observes: "A judicial system cannot be expanded horizontally beyond the capacity of the next tier to process the added cases. For that reason, district courts cannot be indefinitely expanded, unless access to the appellate courts is correspondingly curtailed." *Hearings on the State of the Judiciary*, *supra* note 3, at 149.

[35] Abolition of the mandatory jurisdiction of the Supreme Court is advocated by many commentators and commissions. *See, e.g.*, NEEDS OF THE FEDERAL COURTS, *supra* note 3. As the base of the pyramid continues to expand, creation of a National Court of Appeals at the apex becomes a more attractive idea.

[36] *See Hearings on the State of the Judiciary*, *supra* note 3, at 242 (statement of Robert H. Bork).

II. SUBSTITUTION

The best way to search for alternative techniques within our constitutional and federal system is for Congress to examine the needs of all the residents of this country and then to balance those needs against the inventory of existing resources. Since there already are existing dispute-processing techniques and institutions which have stood the stringent test of time, use of these institutions or techniques as substitution devices immediately comes to mind. Three mechanisms to complement the article III federal judiciary have been suggested: the use of the state court systems to resolve cases falling within their expertise; increased reliance on United States magistrates, with the consent of the parties, to try certain types of criminal and civil cases; and increased reliance on arbitration.[38]

In a discussion of these substitution devices, several conceptual precepts should be kept in mind. First, Congress must be extremely sensitive to the needs of litigants. Shunting of the wrong types of cases to unqualified or insensitive forums amounts to a clear and simple denial of access to justice.[39] Thus, Congress must make a threshold determination that the substitution device is as able as the article III federal court to satisfy its newly delegated functions.[40] In making this determination, standards for awarding high and low priorities must be set. In the highest priority should be placed those cases in which there is a nationally recognized or established social need for resolution of the dispute by a tenured judge, or in the alternative, in which the federal judge possesses unique qualifications to resolve the controversy.[41] This is an easy task. Federal judges perform their most important function in deciding cases that fall within the traditional federal subject matter areas such as copyright, admiralty, and bankruptcy; in protecting the basic civil and constitutional rights of residents of this country; in speedily resolving violations of the federal criminal laws; in interpreting and applying federal laws dealing with labor, antitrust, and securities; and in resolving newly identified rights in an ever changing democratic society such as those which relate to privacy, welfare, occupational safety, consumer affairs, and the environment.[42] In the lowest priority, as aptly observed by Judge Shirley Hufstedler, should be placed

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[37] *Id.* at 251.

[38] President Carter, in his message of February 27, 1979, to Congress, lists these three items as means by which the civil justice system can be improved. 125 CONG. REC. H911-13 (1979). Attorney General Griffin B. Bell and Assistant Attorney General Daniel J. Meador deserve much credit for formulating Administration-backed bills. Their assistance — and that of the President — are much appreciated on Capitol Hill.

A fourth substitution device, not an existing institution, would require the creation of administrative tribunals. The excellent Justice Department report, NEEDS OF THE FEDERAL COURTS, *supra* note 3, at 7-11, concludes that these tribunals could be created to resolve the mass of repetitious factual issues generated by federal regulatory and welfare programs. Specifically mentioned are claims arising under the Social Security Act, the Federal Employers Liability Act, the Consumer Product Safety Act, and the Truth-in-Lending Act. *Id.* at 9. *See also Hearings on the State of the Judiciary, supra* note 3, at 242 (statement of Robert H. Bork).

For a discussion of the success of administrative tribunals in Europe, *see* Remington, *The Tribunaux Administratifs: Protectors of the French Citizen*, 51 TUL. L. REV. 33, 36-37 (1976). In light of the present Administration's proposal to remove all Social Security factual disability determinations from the federal courts, *see* text accompanying notes 135 to 137 *infra*, further serious thought needs to be given to this proposal.

> controversies that are exacerbated rather than resolved by judicial proceedings and those that, though not worsened, do not yield to the remedies that courts can effectively administer. In the context of the federal system, the lowest priority should be assigned to those controversies that can be just as well or better handled by the state court systems.[43]

Second, there should only be a choice of one forum per litigant. The choice of separate and overlapping judicial forums is a luxury our justice system can no longer afford. Third, unless required by federalism or the historical background and present day expertise of the dispute-resolving institution, there should not be arbitrary categorization of the types of cases assigned to the substitute forum. This is necessary to prevent the creation of dual systems of justice and the accidental formation of "poor persons' " courts. Fourth, establishing the criteria and making the decisions are determinations for the legislative branch of government. It is within neither the competence nor the delegated authority of the unelected members of the judicial branch to do so. In this regard, the procedural decisions of the Supreme Court which dramatically shift certain types of cases back to the state courts deserve legislative reconsideration as to whether they have support from our constitutional system of government.[44]

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[39] *Hearings on the State of the Judiciary, supra* note 3, at 112 (statement of Burt Neuborne).

[40] *Id.* at 149 (statement of Shirley M. Hufstedler).

[41] FRIENDLY, *supra* note 3, at 13-14.

[42] *Id.* at 197-98.

[43] *Hearings on the State of the Judiciary, supra* note 3, at 149 (statement of Shirley M. Hufstedler).

To paraphrase Judge Friendly, presumably there is no disagreement with such statements; the troubles come with the application! *See* FRIENDLY, *supra* note 3, at 14.

A. *Diversity of Citizenship Jurisdiction*

The framers of the Constitution explicitly rejected arguments that article III should confer direct congressional oversight authority over the state courts.[45] Nonetheless, today the United States Congress has a very direct interest in the quality of justice rendered at the state court level. Under the federal Constitution, state courts share general responsibility with the federal courts for enforcing the Constitution and the laws of the United States made under the Constitution.[46] Islands of concurrent jurisdiction exist between the state and federal systems. Likewise, there are federal funding programs to aid state courts, and there are formal mechanisms for communications between the two systems.[47] The overall federal interest in fair

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[44] In reflecting upon the Supreme Court's decisions in Francis v. Henderson, 425 U.S. 536 (1976) and Stone v. Powell, 428 U.S. 465 (1976), Senator Gaylord Nelson commented, "[T]hese decisions represent a significant incursion on the constitutional power and obligation of Congress, under article III of the Constitution to define the jurisdiction of the Federal courts." *See* H.R. 2201, 96th Cong., 1st Sess. (1979) (Kastenmeier). *Cf.* McGowan, *Federal Jurisdiction: Legislative & Judicial Change*, 28 CASE W. RES. L. REV. 517 (1978). *See* 123 CONG. REC. S6026 (daily ed. Apr. 20, 1977).

[45] THE FEDERALIST NO. 81 (Hamilton).

[46] *See* note 21 *supra*.

[47] The National Center for State Courts has received substantial federal financial support. These congressionally appropriated funds are channelled to the state courts through the Law Enforcement Assistance Administration.

Thirty-seven state-federal judicial councils now provide formal channels of com-

and equal justice at the state level is analogous to federal interest in quality health care or education at the state level. From the viewpoint of the citizen-consumer, the distinction between state and federal courts is a difference without meaning. The litigant knows he has a problem which must be solved — sometimes by resorting to litigation. Whether the controversy is managed by a federal or a state judge, the citizen's demand for fair, expeditious, and inexpensive justice is exactly the same.[48] This is critically important now since, in a time of stress in our judicial system, it becomes essential that Congress strike "a proper jurisdictional balance between federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism."[49]

The legislative proposal to abolish federal diversity of citizenship jurisdiction, and further, to abolish the existing amount in controversy requirement in federal question cases, is just such an initiative. This legislation passed the House of Representatives during the Ninety-fifth Congress, and unfortunately, narrowly missed being enacted into law because of the opposition of several key senators.[50] An identical bill, introduced in the House as H.R. 2202, is supported by the Administration and by such diverse organizations as the Judicial Conference of the United States, the state courts, the NAACP Legal Defense Fund, public interest and legal aid groups, as well as many legal scholars. A listing of the twentieth century critics of diversity

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munication between the state and federal courts. With no budgets, no staffs, and no central organizations, these councils nonetheless succeed in discussing questions of mutual concern.

In addition, the Conference of (state) Chief Justices has a committee on state-federal relations and concerns itself with important matters affecting both the state and federal systems.

[48] *See Hearings on the State of the Judiciary*, *supra* note 3, at 178 (statement of Robert J. Sheran).

[49] ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS ix (1969) (statement of Chief Justice Earl Warren).

[50] H.R. 9622, 95th Cong., 2d Sess. (1978), passed the House on the suspension calendar on February 28, 1978, by a vote of 266-133. For a history of this legislation, *see Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 15 (1978) (statement of Robert Kastenmeier) [hereinafter cited as *Senate Hearings on Federal Diversity of Citizenship Jurisdiction*]. *See Scott Blocks a Bill in Committee with Rare Solo Filibuster*, Washington Star, Sept. 29, 1978, at A-3, col. 5.

jurisdiction, implicit supporters of this legislation, reads like a lawyer's Hall of Fame: Roscoe Pound,[51] Louis D. Brandeis, Charles William Eliot,[52] Felix Frankfurter,[53] Robert H. Jackson,[54] Henry Friendly, Charles Alan Wright, Warren E. Burger, Earl Warren, Robert H. Bork, and Griffin B. Bell.[55] The strongest opposition has been generated by well organized trial attorneys through their bar associations.[56] Their views, somewhat slow in being enunciated during the last Congress, are now clearly and vigorously stated. Basically, the bar likes forum shopping. The practicing plaintiff's bar perceives the federal forum as being the source of higher verdicts; the defendant's bar sometimes uses, by removal to federal court, the choice of forum to delay the outcome of litigation. Thus, any legislative attempt to modify diversity meets vociferous opposition from those who believe that they have a vested interest in maintaining for their own advantage, the widest choice of forum.[57] Put differently with the same meaning by a famous sociologist, "At the same time that we like to change, we are attached to what we like and we cannot separate ourselves from it without difficulty."[58]

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[51] As early as 1906, Pound described diversity jurisdiction as "archaic." Address on the Causes of Popular Dissatisfaction with the Administration of Justice to the American Bar Association at its Annual Meeting in St. Paul, Minn., 1906, *reprinted in* 35 F.R.D. 273 (1964). When Pound gave his famous speech in 1906, members of the organized bar were so enraged that they accused him of attempting "to destroy that which the wisdom of centuries has evolved." There even were concerted attempts to bar the printing of the speech. J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 362 (1950).

[52] Pound, Brandeis, and Eliot were members of a committee that questioned diversity jurisdiction in 1914. Friendly, *Marching Into the Third Century*, 16 THE JUDGES' J. 6, 8 (1977).

[53] *See* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 53-60 (1954) (Frankfurter, J., concurring).

[54] R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 37 (1955).

[55] The views of Friendly, Wright, Burger, Bork, and Bell are reprinted in *Hearings on the State of the Judiciary*, *supra* note 3, and in *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *1977 House Hearings on Diversity of Citizenship Jurisdiction*].

[56] *See 1977 House Hearings on Diversity of Citizenship Jurisdiction*, *supra* note 55, at 68-83, 230-46 (statements of Robert G. Begam and John P. Frank); *Senate Hearings on Federal Diversity of Citizenship Jurisdiction*, *supra* note 50, at 28-44, 133-48, 161-70 (statements of John P. Frank, Robert G. Begam, and Stephen A. Trimble).

It is interesting to note that the Association of Trial Lawyers of America has even retained a prestigious Washington, D.C., public relations firm to represent the interests of its members on this legislation, as it did for no-fault legislation.

To date, only one bar association (The Chicago Council of Lawyers) is on record as favoring the abolition of diversity jurisdiction.

For a general outline of the views of those opposing the abolition of diversity, *see* Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. __ (1979).

In spite of the organized opposition of the bar, it is clear that the diversity jurisdiction of the federal courts is an idea whose time has passed.[59] The conditions that existed when diversity was created in 1789 are vastly changed today. An analysis of present facts, statistics, and theories by those in the legislative branch lends overwhelming support to the proposition that diversity ought to be abolished. There is little firm evidence to contradict the premise upon which the abolition of diversity is based: that state law questions ought to be resolved in the state courts and that questions arising under federal laws, treaties, or Constitution ought to be resolved in federal court.[60] As concluded in the House Report, the proposal frees the federal courts from the shackles of congestion to do the job they do best:

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[57] 13 C. A. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3601 (1975). Among the backers of diversity are many successful attorneys who make "balance-the-budget" or "states' rights" speeches by night but want to try their cases by day in the federal courts. C. McGowan, The Organization of Judicial Power in the Federal Courts 86-87 (1969).

[58] E. Durkheim, The Division of Labor in Society 254 (trans. G. Simpson 1933). In a similar fashion, a well-known economist observes, "People have an enduring tendency to protect what they have. . . ." J. K. Galbraith, The Age of Uncertainty 11 (1977).

[59] *See* H.R. Rep. No. 95-893, 95th Cong., 2d Sess. (1978) which states, "the original reasons for diversity jurisdiction have long since disappeared." Judge Elmo Hunter, Chairman of the important Court Administration Committee of the Judicial Conference of the United States, agrees: "Whatever justification that existed for its existence has disappeared." Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 U. Mo. Kan. City L. Rev. 347, 356 (1978).

[60] Supporters of diversity also contend that there is an enormous educational value in having two systems in interchange. *See 1977 House Hearings on Diversity of Citizenship Jurisdiction*, *supra* note 55, at 233 (statement of John P. Frank). This argument is insubstantial; with the proliferation of federal statutes and the growth of federal common law, federal judges are not in any danger of becoming narrow technicians nor do lawyers have to wait for the fortuitous circumstance of a diversity case to get into federal court. Moreover, the political goal of the system is not to educate personal injury and corporate lawyers; it is to resolve cases in an expeditious, consistent, and fair manner. Another argument is that diversity jurisdiction is the equivalent of a social welfare program. *See* Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 Tex. L. Rev. 1 (1964). This is totally specious. Diversity jurisdiction, whose benefits flow primarily to attorneys on contingent fees and to major corporations, can hardly be characterized as having anything to do with the social welfare. Even assuming that a minimal case could be made in this regard, with the Proposition 13 and balance-the-budget era upon us, a "social welfare" program of this sort should be the first to go. It certainly should not supplant more meaningful programs.

For rebuttal of other frivolous arguments offered by the bar in support of diversity jurisdiction, *see* Friendly, *supra* note 3, at 146-49.

> adjudicating disputes in traditional federal subject matter areas such as copyright, patents, trademarks, commerce, bankruptcy, antitrust, and admiralty; rendering speedy criminal justice for those accused of crimes; protecting the basic civil and constitutional liberties of all citizens; and resolving vital and often recently identified rights (and sometimes rights not yet identified by the legislative branch) which relate to welfare, occupational safety, the environment, consumerism, and privacy.[61]

The legislation is not, as some have argued,[62] merely a means to alleviate congestion in the federal courts. While it removes nearly 32,000 cases from the federal forum,[63] it does much more. It is an improvement of the American legal system. Three characteristics of a democratic legal system are that judicial decisions are rendered in a consistent manner, litigants are accorded equal application of the laws, and, to the extent possible, the system is comprehensible to ordinary citizens. The concurrent diversity of citizenship jurisdiction of the federal and state courts satisfies none of these principles. On the contrary, it contributes — especially when manipulated by intelligent lawyers — to inconsistent decision making, unequal protection of the laws, and an incomprehensible judicial system.[64]

The abolition of diversity jurisdiction will alleviate these problems by reducing the possibility of conflicts between the state and federal courts.[65] Further, elimination of diversity accords state court systems a respected and well-deserved role in the American judicial system. This is not, however, a states' rights issue. The independence of the state courts and their distinctive role in our national judicial system is long-standing and virtually indestructible at this point. The proposition that the "National Government will fare best if the States and their institutions are left to perform their separate functions in their separate ways" does "not mean a blind deference to *States' Rights* any more than it means *centralization of control* over every important issue in our National Government and its courts."[66] The state and federal courts must work together in search of a common objective — fair, speedy, and cost-effective access to justice for all individuals. This was the goal of the framers and it must be our goal today.

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[61] H.R. REP. No. 95-893, 95th Cong., 2d Sess. (1978).

[62] *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (statements of Robert G. Begam, Edward W. Mullinix, and John C. Shepherd) [hereinafter cited as *1979 House Hearings on Diversity Jurisdiction/Magistrates Reform*].

[63] [1978] DIR. ADMIN. OFF. U.S. CT. REP. A-16 table C2.

[64] *1979 House Hearings on Diversity Jurisdiction/Magistrates Reform*, *supra* note 62. (statement of Thomas D. Rowe, Jr.). For a more in-depth analysis of this proposition, *see* Professor Rowe's excellent article, Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979).

It is not surprising that many lawyers support a legal doctrine which leads to technicalities, inconsistencies, and irrationalities in the legal system. One respected author has identified these items as part of the "continuous growth of the technical element in the law, and hence of its character as a specialists' domain." MAX WEBER ON LAW, ECONOMY AND SOCIETY 321 (M. Rheinstein ed. 1954).

There is no reason to believe that the state courts cannot resolve fairly these state law questions.[67] The state judicial systems, as characterized by the Conference of Chief Justices, are ready, willing, and able to accept the diversity cases presently filed in the federal courts based solely on the fortuitous circumstance of out-of-state citizenship.[68] A recent study conducted by the National Center for State Courts confirms that state courts have the manpower to handle a heavier case load.[69] If this were otherwise, one would have to think twice about this significant legislation. Even assuming, but not admitting, that some of the state courts are not as capable of providing the same quality of justice as their federal counterparts, or that there are longer delays in some state courts in urban areas, the solution is not to allow over 30,000 diversity cases to be filed in the federal courts, but rather to commit time and resources to improving the quality of state-administered justice.

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[65] C. McGowan, The Organization of Judicial Power in the Federal Courts 83 (1969).

[66] Younger v. Harris, 401 U.S. 37, 44 (1971). *See also* Texas v. White 74 U.S. (7 Wall.) 700 (1868).

[67] In Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court held that the federal courts must apply the substantive law of the states in diversity cases. However, the federal courts in such cases are not allowed authoritatively to determine state law; only the state courts can do this. For further discussion of the Erie doctrine and its corrosive effects on the federal and state courts, *see* Letter from Henry J. Friendly to Robert W. Kastenmeier (November 4, 1978), *reprinted in 1977 House Hearings on Diversity of Citizenship Jurisdiction, supra* note 55, at 377. *See 1977 House Hearings on Diversity of Citizenship Jurisdiction, supra* note 55, at 142 (statement of Edward T. Gignoux). *See also* Employers Liab. Assurance Corp. v. Travelers Ins. Co., 411 F.2d 862, 865-66 (2d Cir. 1969).

[68] Resolution of the Conference of Chief Justices (Aug. 3, 1977), *reprinted in Hearings on the State of the Judiciary, supra* note 3, at 519.

[69] Flango & Blair, *The Relative Impact of Diversity Cases on State Trial Courts*, 2 St. Court J. 20 (1978).

Irrespective of the abolition of diversity jurisdiction, another proposition warrants attention. Serious thought should be given to creation of a national program of assistance to state courts, possibly along the lines of an independent Legal Services Corporation. This program would grant monies to state court systems so that they could maintain and improve the quality of their justice at the same rate as the federal courts. In the interim, there must be continued coordination and cooperation between the federal and state judiciaries in areas of mutual concern. Neither of these propositions means that the federal government should get into the job of regulating state-administered justice. Rather, it signifies that the appropriate congressional role is to allow the states to advance the initiative, as has been done,[70] and then to examine the idea. It also means that the state and federal governments have concomitant obligations to provide high quality justice to all.

The Ninety-fifth Congress did act to provide aid to the states in this regard. The Senate passed legislation designed to give states seed money to experiment with the resolution of minor disputes.[71] The legislation also provided for the creation of a dispute resolution resource center within the Department of Justice to coordinate information about the resolution of minor disputes and to disseminate that information to interested individuals and states. Unfortunately, this proposal narrowly missed passage by the House on its suspension calendar.[72] The

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[70] Report to the Conference of Chief Justices from the Task Force on a State Court Improvement Act (February 1, 1979) (unpublished). *See also Hearings on the State of the Judiciary, supra* note 3, at 181-82 (statement of Robert J. Sheran).

[71] S. 957, 95th Cong., 2d Sess. (1978) (referred to as the Dispute Resolution Act) passed the Senate on June 29, 1978. For an explanation of this legislation *see Hearings on the Dispute Resolution Act (S. 957) Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) (statements of Edward M. Kennedy and Daniel J. Meador).

[72] S. 957, as amended, failed under suspension of the rules consideration by a vote of

House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, however, did put its stamp of approval on the legislation, as did the House Committee on Interstate and Foreign Commerce.[73] Similar legislation has been reintroduced during the Ninety-sixth Congress, has passed the Senate, and thus far has received favorable treatment in the House.[74]

B. *Magistrates Reform*

A second substitution measure also relies on an existing institution: the United States magistrate. Virtually every common-law judicial system has subordinate judicial officers who act to meet the ebb and flow of societal demands made upon judicial institutions.[75] The United States magistrate is such an officer.

The federal magistrates system was created by enabling legislation in 1968.[76] It built upon the existing foundation of the United States commissioner system which had been in existence since 1793.[77] The 1968 Act, an effort to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice,"[78] created a new tier of judicial of-

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224-166 (a two-thirds majority being needed). 124 Cong. Rec. H12,607 (daily ed. Oct. 12, 1978).

[73] The Subcommittee on Courts, Civil Liberties and the Administration of Justice reported out an amended version of the bill on September 19, 1978; the Committee on Interstate and Foreign Commerce reported an almost identical version on September 28, 1978. H.R. Rep. No. 95-1654, 95th Cong., 2d Sess. pt. 1 (1978).

[74] H.R. 2863, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. H1328 (daily ed. Mar. 13, 1979) (Kastenmeier, for himself, *et al.*); H.R. 3719, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. H2354 (daily ed. Apr. 25, 1979); S. 423, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. S1429 (daily ed. Feb. 9, 1979). S. 423, a bill identical to S. 957 as passed by the Senate in 1978, cleared the Senate on April 5th, 1979. The House Judiciary Committee and the House Interstate and Foreign Commerce Committee have reported favorably amended versions of this bill. *See* H.R. Rep. No. 96-492, Pt. I, 96th Cong., 1st Sess. (1979).

[75] Jacob, *Models from Common Law Countries* in State Courts: Blueprint for the Future 211 (T. J. Fetter ed. 1978); Silberman, *Masters and Magistrates, Part I: The English Model,* 50 N.Y.U.L. Rev. 1070, 1072 (1975).

[76] Pub. L. No. 90-578, 82 Stat. 1107-08 (1968) (codified as amended at 28 U.S.C. § 636 (1976)).

[77] Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334, provided that designated individuals "learned in the law" could assist United States courts in taking bail in criminal cases. In 1817 these individuals were officially designated as commissioners. Act of March 1, 1817, ch. 20, 3 Stat. 350.

[78] H.R. Rep. No. 1629, 90th Cong. 2d Sess. 11 (1968).

ficers by transferring to the magistrate the criminal justice responsibilities of the old commissioners, by granting increased duties in the criminal area, and by expanding judicial responsibilities in the civil area.[79]

The Federal Magistrates Act of 1968, which was implemented in all districts in 1971, worked for four years before being examined by Congress. One of the flaws in the original legislation had been that the powers of the magistrates were not precisely delineated. The result was uneven usage of these judicial officers throughout the federal judicial system.[80] In addition, a number of courts restrictively construed the role of magistrates.[81] Consequently, in 1976 Congress amended the existing law[82] to "clarify and further define the additional duties which may be assigned a United States Magistrate in the discretion of a judge of the district court."[83] Although the 1976 reform clearly broadened the powers of magistrates, it still left the appointment and utilization of these individuals to judges of the district court. Furthermore, in spite of the fact that additional duties were clarified, the 1976 amendments manifested congressional intent that continued experimentation with the use of magistrates ought to be allowed. This had two results: first, continued unevenness in quality, and second, disparity in the use of magistrates.[84] It also made more legislation "inevitable."[85]

Thus, in 1977 the Department of Justice, and its newly created Office for Improvements in the Administration of Justice, stepped into the breach and formulated a proposal to solve these problems. The gist of the Department's proposal is still intact in the legislation that has passed the Congress.[86] The purpose of the proposed legislation is to amend the current jurisdictional provisions for United States magistrates in order to clarify and expand their jurisdiction to try civil cases — which is now done in over forty districts by local rule — and to dispose of criminal misdemeanors.[87] All of this expanded jurisdiction is based on the parties' free and voluntary consent to the exercise of case-dispositive power by the magistrate.[88] This legislative initiative also provides for higher standards of magistrate competence and explicit procedures for magistrate selection. It additionally contains a statutory bar to the assignment of certain categories of cases to magistrates.[89]

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[79] For a detailed history of the 1968 legislation, *see* Spaniol, *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L. J. 565.

[80] Silberman, *Masters and Magistrates, Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1299-1302 (1975).

[81] *See, e.g.*, Wingo v. Wedding, 418 U.S. 461 (1974); Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972): TPO, Inc. v. McMillan, 460 F.2d 348 (7th Cir. 1972).

[82] 28 U.S.C. § 636 (1976).

[83] H.R. REP. NO. 94-1609, 94th Cong., 2d Sess. 1 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6162. The House report specifically states that the restrictive decisions in Wingo v. Wedding, Ingram v. Richardson, and TPO, Inc. v. McMillan, *supra*, would be overridden by passage of the bill. *Id.* at 6165.

[84] *See* H.R. REP. No. 95-1364, 95th Cong., 2d Sess. 6 (1978).

[85] Report on the Magistrate System in the Southern District of New York, Association of the Bar of the City of New York – Federal Bar Council 2 (1977), *reprinted in 1977 House Hearings on Diversity of Citizenship Jurisdiction*, *supra* note 55, at 387.

There are several reasons for this sound legislation. It solves the problems of continued disparity of quality, unevenness of usage, and ambiguity concerning the extent of trial powers. It further adds needed flexibility to the federal judicial system. The legislation provides a supplementary judicial power to meet the varying demands made on the federal judicial system and the multitudinous needs of litigants in that system. If the latter wish to consent, freely and voluntarily, to a less formal, more rapid, and less expensive means of solving their civil and criminal controversies, they may do so.

The magistrates reform legislation is interwoven with the omnibus judgeship legislation and the abolition of diversity bill to

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[86] *See* H.R. 1046, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H187 (daily ed. Jan. 18, 1979) (Kastenmeier, for himself, Rodino, Danielson, Mazzoli, Santini, McClory, and Railsback); S. 237, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S645 (daily ed. Jan. 25, 1979) (DeConcini). *See also* H. CONF. REP. No. 96-444, 96th Cong., 2d Sess. (1979); 125 CONG. REC. H8129 (daily ed. Sept. 19, 1979). For a more detailed discussion of the pending legislation, *see* McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. LEGIS. ____ (1979).

[87] The current jurisdictional provisions for United States magistrates are 28 U.S.C. § 636 (1976) for civil cases and 18 U.S.C. § 3401 (1976) for criminal cases.

[88] In the civil area, the House legislation contains a blind consent provision to ensure that a party is not coerced, subtly or directly, into consenting to trial by a magistrate. In this regard, *see* DeCosta v. Columbia Broadcasting Sys., 520 F.2d 499, 507 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). For criminal cases, the bill preserves the existing requirement that there be consent for trial of petty offenses before a magistrate. For the entire criminal jurisdiction of the magistrate, "a knowing and intelligent waiver" is necessary. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). This is a critical stage of the proceedings requiring the presence of counsel.

[89] This provision guards against so-called "poor people's" courts.

form three compatible segments of a large tapestry of court reform. The magistrates package "addresses itself to a different exigency than that focused upon by the diversity and judgeship bills."[90] As observed in the report of the House Judiciary Committee on the magistrates legislation:

> there is an increasing need for flexibility in the Federal judicial system, which is called upon to act in a rapidly changing society. By redefining and by increasing the case-dispositive jurisdiction of an existing judicial officer — the U.S. Magistrate — the legislation provides the district court with a tool to meet the varying demands on its docket. Because of magistrates' limited tenure and the method of their appointment, magistrate supply and expertise can be designed to complement a particular Article III bench. Because of the consent requirement, magistrates will be used only as the bench, bar, and litigants desire, only in cases where they are felt by all participants to be competent.[91]

This first step in the agenda to improve the administration of justice, recently enacted into law, builds upon the integral and important role that magistrates already play in the federal judicial system.[92] There is no reason to believe that the use of magistrates should not be continued and, indeed, encouraged.[93]

C. *Arbitration*

The Carter Administration has drafted legislation to encourage the use of arbitration techniques in the district courts.[94] As explained by the President, "[T]he arbitration proposal would provide an innovative means for resolving speedily, fairly, and at reduced cost certain types of civil cases in which the main dispute is over the amount of money that one person owes another."[95] The legislation is modeled on the successful use of arbitration procedures by the courts of several states, including Arizona, California, Michigan, New York, Ohio, and Pennsylvania.[96] Moreover, during the past two years, three federal district courts by local rule have implemented arbitration on a test basis.[97] A preliminary report has been filed and the results are encouraging.[98]

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[90] H.R. REP. No. 96-287, 96th Cong., 1st Sess. 20 (1979).

[91] *Id.* The report language borrows heavily from a statement made by Assistant Attorney General Daniel J. Meador:

> The significant feature of this, as indeed with all other features of the magistrate system, as projected, is its flexibility. By enacting this bill, and by continuing the magistrate system otherwise, Congress would not lock the judiciary into any particular arrangement for meeting the ebb and flow of business.

1977 House Hearings on Diversity of Citizenship Jurisdiction, supra note 55, at 188.

[92] Rodino, *Magistrates Reform — A Way to Aid Congested Courts*, TRIAL MAGAZINE, Nov. 1977, at 32.

[93] H.R. REP. No. 96-287, 96th Cong., 1st Sess. 5 (1979). Several courts have expressed approval of the expanded role of magistrates. *See, e.g.*, Sick v. City of Buffalo, 574 F.2d 689 (2d Cir. [illegible]78); DeCosta v. Columbia Broadcasting Sys., 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); United States v. Eastmount Shipping Corp., 62 F.R.D. 439 (S.D.N.Y. 1974).

[94] *See* H.R. 2699, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1145 (daily ed. Mar. 7, 1979).

The proposed legislation, which, in contrast to the diversity and magistrates proposals, has not yet been scrutinized or refined by the House of Representatives, would allow any district court to adopt court-annexed arbitration. The legislative proposal specifically provides that the district court may not refer to compulsory arbitration certain types of cases more appropriately brought before a tenured judge. In particular, a court may not divert cases that involve allegations of civil rights violations, constitutional torts, fraud against the government, or official immunity.[99]

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[95] Message of President Jimmy Carter to the Congress of the United States (February 27, 1979), 125 CONG. REC. H911 (daily ed. Feb. 27, 1979). One respected commentator from within the Administration has questioned the wisdom of increased reliance on arbitration. He argues that arbitration is likely to be directed against "relatively small claims" involving the rights of the poor and powerless. The result may well be that federal statutes will lose their bite, favoring the very institutions against which the statutes were designed to protect. Address by Wade H. McCree, Jr., to the 1977 Law Alumni Banquet, Georgetown University Law Center (April 30, 1977), *reprinted in Hearings on the State of the Judiciary*, *supra* note 3, at 785, 788-91.

[96] 125 CONG. REC. H933 (daily ed. Mar. 7, 1979) (remarks of Peter W. Rodino, Jr.). *See, e.g.*, PA. STAT. ANN. tit. 5 § 21 (1963). For a discussion of general arbitration procedures, *see* Perlman, *Final Offer Arbitration: A Pre-Trial Settlement Device*, 16 HARV. J. LEGIS. __ (1979).

[97] The districts involved are the district of Connecticut (rule effective April 1, 1978), the eastern district of Pennsylvania (rule effective February 1, 1978), and the northern district of California (rule effective April 1, 1978).

[98] Preliminary Report on Court Annexed Arbitration in Three Federal District Courts, U.S. Department of Justice (January 19, 1979) (unpublished).

[99] The procedure envisioned in the draft bill consists of referral of certain types of civil cases to a panel of arbitrators for an early hearing. The general categories consist of actions brought for monetary damages not in excess of $100,000 (or such lower amount as the district court may establish), and which are based upon a negotiable instrument or a contract or are for personal injury or property damages. The proposal

It is not yet apparent how the organized bar will react to the proposed legislation. A signal puff of smoke has risen from the respected Association of the Bar of the City of New York, which has urged Congress to disapprove the bill.[100] The American Bar Association, in spite of a concerted effort to obtain a favorable resolution and in the face of the recommendation of the Association's Report of the Pound Conference Task Force to support arbitration techniques in the federal and state courts, has failed specifically to endorse the legislation.[101]

As written, the arbitration bill could create a number of problems for the administration of justice and would overlap and partially conflict with the diversity and magistrates bills. By allowing district courts to establish by local rule various schemes of court-annexed arbitration, the bill ultimately would breed inconsistency and disparity of treatment within the federal judicial system. The resolution of disputes should not be a game of roulette dependent on where the cause of action arises. Giving such broad discretion to the local district courts to work out their own arbitration procedures could also result in a serious abdication by Congress of its constitutionally allocated responsibility over the structure and jurisdiction of the federal courts. Redelegation of that authority back to the courts should be done only in exceptional circumstances and only upon a showing that local needs and conditions require flexible procedures.[102] During its hearing process, the House Subcommit-

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further provides that the arbitration hearing should be held promptly and that it should be less formal than a court trial. Soon after the conclusion of the hearing, the arbitrators file a written award. In 20 to 30 days, the award is entered as the judgment in the case unless either party files a demand for a trial de novo in the district court. If that petition is filed, the case is replaced on the district court's docket.

However, the legislation contains a disincentive for a trial de novo in the district court, since the party who requests the trial de novo may be taxed the costs of arbitration. The rationale for this is not readily apparent; its political and constitutional ramifications will have to be closely examined by the legislative branch.

[100] Report by the Committee on Federal Courts of the Association of the Bar of the City of New York on Proposed Legislation to Provide for Compulsory Non-Binding Arbitration of Certain Cases in Federal Courts (March 1978) (unpublished).

[101] *See* Pound Conference Follow-Up Report, *supra* note 8, at 12-16. At the August 1978 meeting of the ABA, a resolution of the Judicial Administration Division to support the legislation in principle was defeated.

[102] A similar suggestion was made by a respected professor in reference to diversity of citizenship jurisdiction. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977). This idea was considered by the House Judiciary

tee on Courts, Civil Liberties and the Administration of Justice will have to analyze this component of the arbitration bill carefully.

The arbitration proposal must likewise be considered in light of the pending diversity and magistrates legislation. For example, many of the tort cases slotted for arbitration are diversity cases that will no longer be tried in federal courts if Congress abolishes diversity jurisdiction. In the magistrates area, the House Committee on the Judiciary spent much time and energy in debate and finally set forth a detailed scheme to ensure that United States magistrates will be qualified to handle their increased consensual jurisdiction.[103] The arbitration legislation, which is largely non-consensual, provides no such standards and procedures for merit selection of arbitrators. In a similar vein, the proposal is silent on whether the pool of available arbitrators should reflect a cross-section of American society. These aspects must be made parallel to the magistrates legislation.

In summary, the arbitration legislation is a good idea that deserves to be examined seriously through the congressional hearing process. Although the bill needs some corrective surgery during the amendment stages, if this is done and if the idea is implemented fairly and consistently under the direction of qualified individuals, this third substitution device can provide a means to a speedier and less costly resolution of disputes.[104]

III. CONSERVATION

In a time of stress and competition for a scarce resource,

Committee and rejected. *See* 124 CONG. REC. H1559 (daily ed. Feb. 28, 1978) (remarks of Robert F. Drinan).

[103] *See* H.R. 1046, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H187 (daily ed. Jan. 18, 1979); H. REP. No. 95-1364, 95th Cong., 2d Sess. (1978).

[104] *See* Rosenberg & Schulbin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3.

The proposition that arbitration can work equitable results hardly needs support: "It is equitable . . . to agree to arbitration rather than go to court — for the umpire in an arbitration looks to equity, whereas the juryman sees only the law. Indeed, arbitration was devised to the end that equity might have full sway." 1 THE RHETORIC OF ARISTOTLE 77-78 (L. Cooper trans. 1932).

there must be conservation. Everyone knows that an automobile will get better mileage if its engine is kept in tune. Similarly, the judicial system will perform more efficiently if its participants — judges, jurors, witnesses, lawyers, and litigants — are treated with a modicum of support. A mere oiling of the wheels of justice, a tightening of a nut and bolt here and there, while not solving fundamental problems, can nonetheless be very useful. Many conservation, or housekeeping measures can keep the judicial system up-to-date with changes in society.[105]

By way of illustration, the Ninety-fifth Congress enacted legislation which raised witness fees,[106] increased juror fees, protected jurors' employment, redefined the section on hardship exemption from jury service,[107] provided flexibility to courts in the area of marshals' transportation expenses,[108] and created several new places of holding court and modified several division and district dividing lines.[109] The significance of these bills has gone largely unnoticed. There is a rush among commentators to discuss more comprehensive pieces of legislation. This is understandable but unfortunate. The Jury Improvements Act of 1978,[110] for example, actually was a very important legislative endeavor. Individuals who serve on juries exercise an awesome responsibility in the American justice system. Juries decide the fate of their fellow men — their property, their freedom, and sometimes their lives.[111] Yet, until recently, not much attention has been accorded to the individuals who are called to jury service.[112]

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[105] Roscoe Pound emphasized the importance of conservation by stating: "The controlling ideas [of court organization] should be unification, flexibility, conservation of judicial power and responsibility." R. Pound, Organization of Courts 275 (1940).

[106] Act of Oct. 27, 1978, Pub. L. No. 95-535, 92 Stat. 2033.

[107] Act of Nov. 2, 1978, Pub. L. No. 95-572, 92 Stat. 2453.

[108] Act of Oct. 24, 1978, Pub. L. No. 95-503, 92 Stat. 1704.

[109] Act of Oct. 2, 1978, Pub. L. No. 95-408, 92 Stat. 883; H.R. Rep. No. 95-1554, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 3923; Act of Nov. 2, 1978, Pub. L. No. 95-573, 92 Stat. 2454; H.R. Rep. No. 95-1763, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7000.

[110] Pub. L. No. 95-572, 92 Stat. 2453.

[111] *See, e.g.*, Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 133, 134 (1967). *See also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Duncan v. Louisiana, 391 U.S. 151 (1968).

[112] Not until 1948 did Congress make any attempt to enact qualification standards for federal jurors. Twenty years later, Congress finally passed the Jury Selection and

The federal justice system cannot bear the weight of dissatisfied citizen-participants who are either under-compensated for their service to the government or who are harassed by employers hostile to the idea of jury service. By the same token, the system cannot afford to lose the support of employers, especially those with small businesses and a handful of key employees, who will suffer severe economic hardship if they lose an employee for a long period of time. The legislation passed by the Ninety-fifth Congress successfully balances these competing concerns. It provides needed lubrication to the squeaky gears of the federal jury system.[113] Similar legislation provided needed relief for witnesses and United States marshals.[114]

A. *The Court Improvements Act of 1979*

A court conservation or improvements package for the Ninety-sixth Congress has been prepared by the Administration, with assistance by members and staffs of the House and Senate Judiciary Committees.[115] In brief, this legislation modifies the statutory provisions affecting the selection and length of service of the chief judges in the district and circuit courts, clarifies the procedures that circuit courts must follow when sitting on appeals, increases the responsibilities of circuit

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Service Act of 1968 which, for the first time, imposed federal juror qualification standards and selection procedures. *See* S. Rep. No. 891, 90th Cong., 1st Sess. 9-12 (1967).

It is interesting to note that during the Ninety-fifth Congress, the Subcommittee on Courts, Civil Liberties and the Administration of Justice received more correspondence from ordinary citizens on issues relating to juror service than any other court reform measure. For a sampling of these letters, *see Hearings on Judicial Housekeeping Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 331-64 (1978).

[113] For an explanation of this legislation, *see* H.R. Rep. No. 95-1652, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5477.

[114] *See* H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 6397; H.R. Rep. No. 95-1653, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5494.

[115] This legislation has taken the form of H.R. 2848, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. H1327 (daily ed. Mar. 13, 1979) (Kastenmeier) and S. 677, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. S2869 (daily ed. Mar. 15, 1979) (Kennedy). Senator Kennedy's bill contains a proposal to merge the Court of Claims and the Court of Customs and Patent Appeals into a new twelfth circuit court of appeals: the Court of Appeals for the Federal Circuit. In the House of Representatives this has been introduced in a separate bill, H.R. 3806, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. H2459 (daily ed. Apr. 30, 1979) (Rodino).

councils and broadens their membership, contains a section on retirement and pensions of federal judges, liberalizes the powers of federal courts to transfer cases to the proper court to cure want of jurisdiction, and lastly, resolves existing ambiguities in the law relating to interest on judgments and prejudgment interest.[116]

Indisputably, these proposed modifications, all of which must now begin the arduous trek through the legislative process, merely tinker with the system; nonetheless, they are extremely important to those assigned the responsibility of administering justice on a day-to-day basis. As a consequence, the lawmaker must give these proposals close scrutiny, and if they are meritorious, they must not be allowed to fall into the "dead bill" file.

B. *Standing and Other Threshold Issues*

The federal courts themselves have been negligent in conserving their own manpower. Some judges have been quite inefficient in allocating the limited resources that are provided. Jury venires wait for indeterminate periods of time,[117] court calendars are poorly maintained, and archaic management techniques are used. There have been improvements in this area, but there is still much to be accomplished. An area of particular concern to the Congress, partly because the problem is created by the judges themselves and partly because the rights of citizen-litigants are implicated, is that of standing.

There are two basic elements in the concept of standing. The first is rooted in the "case and controversy" requirement of the Constitution and cannot be modified by legislative action.[118] The second involves what is referred to as "prudential" rules of standing: that is, rules developed by the federal courts to control the number and types of cases filed in the courts. Congress clearly has the authority — and, indeed, the obligation — to clarify or remove these arbitrary barriers.[119]

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[116] *Id.*

[117] *See, e.g.*, Higginbotham, *Use of Jurors*, 62 F.R.D. 211 (1973).

[118] *See* Flast v. Cohen, 392 U.S. 83, 91-106 (1968); *see also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72-81 (1978).

[119] *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-12 (1972).

At present, challenges to standing often are combined with justiciability defenses to delay a hearing on the merits of a case. This clearly is not efficient nor is it fair. Further, restrictive and inconsistent decisions on standing often result in a tremendous waste of judicial resources while lower court judges are left to decipher confusing commands from the higher courts. Mr. Justice Brennan has voiced concern that recent Supreme Court decisions in the area of standing have created "an obstacle course of confusing standardless rules to be fathomed by courts and litigants, without functionally aiding in the clear, adverse presentation of the constitutional questions presented."[120]

With this in mind, Congress should act once and for all to confront the delicate issue of standing and remove inappropriate judicially constructed barriers to the federal judicial system. Clarity and consistency ought to be the ultimate goals. This would render the courts more efficient by reducing the amount of time expended in resolving threshold issues; at the same time, it undoubtedly will increase their overall workload by raising the number of lawsuits filed in federal court. On balance, however, considering the other reforms discussed herein, the federal courts will not be unduly burdened by liberal standing legislation.[121]

Likewise, judicial resources could be conserved if artificial barriers to class actions were removed. The Department of Justice's efforts to draft a comprehensive class action statute should be applauded.[122]

C. *Mandatory Jurisdiction of the Supreme Court*

The nine justices who sit on the Supreme Court are mere mortals with limited time and resources. Abolition of the obligatory jurisdiction of the Supreme Court,[123] another reform embraced by the Administration, would allow the justices to conserve their finite resources by giving them more discretion over their docket. This proposal is a logical extension of the Judges' Bill of 1925 which has worked well.[124] Today, the Supreme Court is trusted to resolve many issues of critical importance to our society; it surely can be trusted to decide which cases are most in need of review.[125]

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[120] Kremens v. Bartley, 431 U.S. 119, 140 (1977) (Brennan, J., dissenting) (citations omitted).

[121] Legislative proposals to broaden standing are pending in both the House and the Senate. *See* H.R. 1047, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. H187 (daily ed. Jan. 18, 1979) (Kastenmeier, for himself, Harris, and Railsback); S. 680, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. S2869 (daily ed. Mar. 15, 1979) (Metzenbaum, for himself, Kennedy, and Ribicoff). *See generally Hearings on the Citizens' Right to Standing in Federal Courts Act of 1978 (S. 3005) Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary and the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (1978).

[122] *See* S.3475, 95th Cong., 2d Sess. (1978), 124 Cong. Rec. S14,501 (daily ed. Aug. 25, 1978) (DeConcini, for himself, and Kennedy). The Department has not yet forwarded a class action bill to the Ninety-sixth Congress. For a discussion of this pro-

This is good legislation for two reasons. The present statutory scheme, by mandating jurisdiction of certain controversies in the High Court, permits litigants to bring cases before the Court by right. Necessarily, the members of the Court are required to devote their time to deciding cases of lesser consequence. This takes them away from other cases of national importance.[126]

Moreover, abolition of the Court's mandatory jurisdiction would help avoid the vexatious problem of resolving appeals by summary disposition, and then, of determining the precedential value of summary dispositions. The Court has observed, "our summary dispositions often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity."[127] Abolishing mandatory jurisdiction is a

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posal, *see* Wells, *Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal*, 16 HARV. J. LEGIS. ______ (1979).

[123] *See* H.R. 2700, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1145 (daily ed. Mar. 7, 1979) (Rodino); S. 450, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S1666 (daily ed. Feb. 22, 1979) (DeConcini). The proposed legislation eliminates the jurisdiction of the Supreme Court to review, by way of appeal, those classes of federal court cases specified in 28 U.S.C. §§ 1252, 1254(2), 1257(1)(2). These cases would be reviewable in the future only by the writ of certiorari. The legislation also repeals three specialized types of direct appeals to the Supreme Court, making these cases reviewable also only by certiorari.

The proposed legislation follows the recommendations of the Freund Committee. FREUND REPORT, *supra* note 8, at 25-38. *See also* NEEDS OF THE FEDERAL COURTS, *supra* note 3, at 11-13.

[124] The Supreme Court's jurisdiction has remained substantially unaltered since the 1925 Act. *See* 28 U.S.C., ch. 81 (1976).

[125] NEEDS OF THE FEDERAL COURTS, *supra* note 3, at 13.

[126] *Hearings on Supreme Court Jurisdiction Act of 1978 (S. 3100) Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 3 (1978) (statement of Daniel J. Meador).

[127] Letter from the Justices of the United States Supreme Court to Senator Dennis DeConcini (June 22, 1978), *reprinted in id.* at 40. An analysis of the case law of the Supreme Court confirms this proposition. In Edelman v. Jordan, 415 U.S. 651 (1974),

needed reform which would conserve the time and resources of confused lawyers and litigants, as well as state and federal judges, and would have the further salutary effect of saving time for the nine judges on the Supreme Court.[128]

D. *Civil Rights of Institutionalized Persons*

A final court conservation measure is included in the legislation to provide the Attorney General of the United States with standing to initiate civil actions to redress systematic deprivations of rights of institutionalized persons when those rights are protected by the Constitution or laws of the United States.[129] The bill's primary purpose, of course, is to provide a mechanism to vindicate the rights of institutionalized persons. Another equally important legislative goal is to stimulate the development and implementation of effective administrative techniques for the resolution of grievances in correctional institutions. The proposed legislation empowers a district judge to continue a case for a limited period of time when an effective alternative mechanism exists and use of it by a prisoner prior to litigating a civil rights complaint would be appropriate and in the interest of justice.

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the Court held that a summary disposition carries less precedential value than an opinion on the merits. Then, one year later, in Hicks v. Miranda, 422 U.S. 332 (1975), the Court proclaimed that a dismissal of a mandatory case for lack of a substantial federal question is a decision on the merits whose precedential value is unclear. Shortly thereafter, in Mandel v. Bradley, 432 U.S. 173 (1977), the Court attempted to clarify the situation by holding that a summary affirmance merely rejects the contentions offered for reversal and is not binding beyond the arguments specifically rejected. This latter opinion helps a little. It, however, requires inquisitive counsel to scour the legal pleadings rather than the Court's opinion to decipher the exact holding.

[128] S. 450, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S1666 (daily ed. Feb. 22, 1979), passed the United States Senate on April 9, 1979. 125 CONG. REC. S4138-57 (daily ed. April 9, 1979). Its future in the House, however, is in doubt because of the Helms amendment to restrict the judicial authority and power of the United States Supreme Court to review state court decisions on the issue of voluntary school prayer. Any proposal to eliminate the appellate jurisdiction of the Supreme Court with respect to constitutional controversies is likely, in turn, to raise serious constitutional questions about the extent of Congress' power to establish the appellate jurisdiction of the Supreme Court. It additionally raises important questions of public policy.

For further discussion of this issue, *see* note 163 and accompanying text *infra*.

[129] This legislation is embodied in H.R. 10, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H126 (daily ed. Jan. 15, 1979) (Kastenmeier); and S. 10, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S33 (daily ed. Jan. 15, 1979) (Bayh).

For two unrelated reasons, passage of this legislation would result in conservation of limited judicial resources. First, increased reliance on administrative grievance procedures coupled with the court's ability to order a continuance while the parties pursue administrative remedies will result in the resolution of many disputes outside the judicial system. A second factor to consider is the contribution that the Department of Justice makes to the effective and expeditious resolution of "pattern and practice" institutional civil rights cases. As noted in the House Report, "The Department's ability to streamline complex litigation results in a notable conservation of judicial resources."[130]

IV. RATIONING

Learned Hand put it best in an often quoted, but little examined, phrase: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[131] Although this edict was directed at legal aid lawyers, it clearly was intended for the entire legal profession, and more importantly, for the three branches of government.

Before examining the concept of rationing and its applicability to the three branches, several points must be made. First, Hand's commandment retains its validity today in a time of intense pressure for the increasingly finite resource of federal judicial time. As a reminder, it should be carved in stone on a House or Senate office building or a federal courthouse.

This article seeks to show that legislative resort to the techniques of expansion, substitution, and conservation will make rationing unnecessary, and indeed, unthinkable. There is no other choice. In a democratic state "justice is indiscriminately due to all, without regard to numbers, wealth, or rank."[132] Justice is not readily divisible and therefore cannot be rationed fairly.

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[130] H.R. REP. No. 96-80, 96th Cong., 1st Sess. 16 (1979).

[131] Hand. *Thou Shalt Not Ration Justice*, 9 BRIEF CASE 3, 5 (Apr. 1951) (excerpt from the speech of Judge Hand on the occasion of the 75th Anniversary Dinner of the Legal Aid Society of New York).

[132] Georgia v. Brailsford, 3 U.S. (3 Dall.) 483, 484 (1794) (Jay, J.).

Some commentators have argued[133] — and others undoubtedly will join them — that the substitution devices discussed above, especially the abolition of diversity jurisdiction, are rationing in disguise.[134] This is not so. The device of substitution refers disputes to a dispute settlement technique or institution which has proven that it can function expeditiously, fairly, and inexpensively. Before deciding to substitute, the legislator must carefully and conscientiously consider whether the new procedure or institution is able to fulfill its delegated functions. If this is not done or if the decision to substitute is made with foreknowledge that an inferior quality of justice will result, then rationing has occurred. Likewise, if a cause of action is removed from the federal judicial system and no substitution device is provided in return, then rationing has transpired and Hand's commandment has been violated.

In the Ninety-sixth Congress, one can identify only one legislative proposal to ration judicial time. Title IV of the draft bill to amend the Social Security Act[135] abolishes the existing jurisdiction of the federal district courts to review final decisions of the Secretary of Health, Education and Welfare denying application for disability benefits. Under present law, district court review of the Secretary's decisions is limited to a determination whether his findings are supported by substantial evidence.[136] Unsurprisingly, this is a time-consuming task for federal judges and magistrates. The Social Security legislation, which is supported by the Administration, does not provide an alternative forum, such as a specialized disability review tribunal. It merely relies on existing mechanisms within HEW which are not reputed to work very well. Vague promises have been made to

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133 During the House Hearings on the State of the Judiciary, two witnesses characterized the abolition of diversity jurisdiction as a rationing device. *Hearings on the State of the Judiciary*, *supra* note 3, at 112-14, 116, 121, 124, 127, 149, 152 (statements of Burt Neuborne and Shirley M. Hufstedler). Both of these respected commentators support the elimination of diversity.

134 *See* Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. _____ (1979); *1979 House Hearings on Diversity Jurisdiction/Magistrates Reform*, *supra* note 62.

135 H.R. 2854, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1328 (daily ed. Mar. 13, 1979).

136 The cases on this point are legion. *See, e.g.*, Richardson v. Perales, 402 U.S. 389 (1971).

improve the existing system. Fortunately, the House subcommittee responsible for the legislation quickly dealt with the controversial title IV by striking it in its entirety.[137] Thus, an attempt to ration was shortlived.

The legislative branch has not always been so wise and has occasionally violated Judge Hand's commandment. For example, Congress enacted expansive legislation which provides that decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments administered by the Veterans Administration shall be final and conclusive.[138] No other official nor any court of the United States has power or jurisdiction to review any such decision.[139]

Congress clearly acted within its constitutional prerogative in enacting legislation barring claimants to veterans' benefits from the federal courts.[140] Nonetheless, rationing has occurred and legislative proposals to remedy this draconian treatment of a certain category of controversies ought to be considered by the Ninety-sixth Congress.[141]

The judicial branch also has engaged in rationing. It is extremely disturbing that a recent series of judicial pronouncements cutting off access to the federal courts appears to have been prompted by rising caseloads. A vigorous dissenting opinion by Mr. Justice Douglas suggested this possibility:

> The mounting caseloads of the Federal courts are well known. But cases such as this one reflect festering sores in our society. . . . I would lower technical barriers and let courts serve that ancient need. They can in time be curbed by legislative or constitutional restraints if an emergency arises. We are today far from facing an emergency.[142]

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[137] *See* H.R. 3236, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1736 (daily ed. Mar. 27, 1979) which is a clean version of the bill reported to the full Ways and Means Committee by the Subcommittee on Social Security.

[138] 38 U.S.C. § 211(a) (1976).

[139] *Id.* For a detailed discussion of this legislation, *see* H.R. REP. NO. 91-1166, 91st Cong., 1st Sess. (1970). *See also* De Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972).

[140] It is within the Congress' power to issue such a command; when rights of an individual against the United States are created, Congress is under no obligation to provide a remedy through the courts. United States v. Babcock, 250 U.S. 328 (1919).

[141] *See* H.R. 159, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H161 (daily ed. Jan. 18, 1979) (Brodhead).

[142] Warth v. Seldin, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).

This thesis was seconded by Mr. Justice Brennan who, in scathing criticism of several recent Supreme Court decisions,[143] observed:

> federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered. Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated and systematic violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism.[144]

These are serious allegations which heighten concern on Capitol Hill because they are levelled by two highly respected jurists and also because the salvos were fired from within the Supreme Court itself.

During the Ninety-fifth Congress the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice held extensive oversight hearings on the state of the judiciary and access to justice. The scope of the inquiry, as revealed in the title of the hearings, was necessarily broadened to include not only the subject of court-related problems and the proposals to solve them but also the subject of accessibility of citizens to the federal judicial system. In this latter regard, one of the openly enunciated goals of the hearings was to examine the accusations of Justices Douglas and Brennan.[145]

While no witness during this inquiry was able to identify explicitly a uniform pattern, it became clear that during the past decade a number of significant decisions have made it more difficult to get a federal court to vindicate federal constitutional and statutory rights.[146] Aggrieved persons prepared to litigate issues on the merits have been barred from the federal courthouse doors by sometimes novel, shifting, and progressively more stringent threshold rulings.[147] It is likely that endemic court congestion has been at the root of these decisions.

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[143] In footnotes, Mr. Justice Brennan specifically mentions the following cases: Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Paul v. Davis. 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); and Hicks v. Miranda, 422 U.S. 332 (1975).

[144] Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

[145] *Hearings on the State of the Judiciary*, *supra* note 3, at 5 (statement of Robert W. Kastenmeier).

[146] *Id.* at 10, 11-19, 112-17, 167-69, 255-60 (statements of Ralph Nader, Burt Neuborne, William Cunningham, Steven Steinglass, and Dennis Sweeney).

It is outside the scope of this article and beyond the expertise of its authors to examine a decade of Supreme Court case law. That is an endeavor best left to academicians.[148] Several political observations are in order, however. From a policy perspective, what must be stated is that the primary obligation of the federal judicial system is to provide a forum to resolve on the merits the cases for which it is best equipped: not resolving state law questions which arise under federal diversity of citizenship jurisdiction, but adjudicating serious claims which arise under the Constitution, laws, or treaties of the United States.[149] Since most of the restrictive decisions of the Supreme Court have affected federal rights, Congress, in return for aiding the federal courts by abolishing diversity jurisdiction and by enacting the other reforms discussed herein, should enact legislation designed to reopen courthouse doors that have been slammed shut.

V. AVOIDANCE

By definition, it takes the actions of two parties to create a dispute. Avoidance occurs when one of the disputants limits his relationship with the other so that the dispute is suppressed or no longer remains salient.[150] It is helpful for the policymaker to keep in mind that available dispute processing alternatives create a spectrum ranging from adjudication at one end to avoidance at the other, with mediation, conciliation, ombudsmen, and negotiation in the middle.[151] There is, indeed, a wide expanse between settling a dispute with a formal hearing at the United States Supreme Court with its nine black-robed justices and abandoning it by turning the other cheek.

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[147] Goldberg & Schwartz, Supreme Court Denial of Citizen Access to Federal Court to Challenge Unconstitutional or other Unlawful Actions: The Record of the Burger Court (a Statement of the Board of Governors of the Society of American Law Teachers) at ii (1978).

[148] *Id. See also* Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); McGowan, *Federal Jurisdiction: Legislative and Judicial Change*, 28 CASE W. RES. L. REV. 517 (1978); Rathjen & Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 AM. J. POL. SCI. 360 (1979).

[149] *See* FRIENDLY, *supra* note 3, at 197-98; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[150] Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 70 (1974).

From a legislative perspective, avoidance is usually not of much concern because it is so amorphous. It is not easily caged by statutory language nor is there adequate empirical evidence measuring its exact dimensions in our society. Nonetheless, its existence cannot be questioned. Examples abound: consumers switch their trade from one businessman to another because of the purchase of a defective product; workers quit jobs because of race or sex discrimination; neighbors visit less or even sell their houses because of barking dogs, raucous parties, or unkept lawns.[152] For many people with low incomes, the formal judicial system is beyond reach. Their economic status forces them to avoid costly adjudication.

Avoidance in a modern, democratic society like the United States, to paraphrase Durkheim, is like a person's temperature: If it is too high or low, there is cause for concern.[153] The lawmaker should recognize that there are enormous social costs if people are obliged, either because of high legal costs or extended court delays, to solve many disputes by avoidance or self-help.[154] Similarly, it is not cost-effective or functional for all disputes to be resolved through formal pleadings before a tenured judge. More importantly, if the poor and oppressed — those who often must resort to the legal system to obtain even the basic necessities of life — lack access to a dispute resolving institution, the promise of equal justice under law rings hollow.[155] Creation of the private, independent Legal Services

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[151] Sander, *Varieties of Dispute Processing*, in 70 F.R.D. 111, 114 (1976); W. Gellhorn, When Americans Complain (1966).

[152] *See, e.g., Hearings on the Dispute Resolution Act, supra* note 71. It should be recognized that twentieth-century life in the United States is increasingly unneighborly and depersonalized. Consumers deal with national chains, workers toil on large assembly lines, and neighbors do not know each other. The importance of avoidance as an individual statement is lessened if the other side of the dispute does not get the message.

[153] *Cf.* K.C. Davis, Discretionary Justice: A Preliminary Inquiry 27 (1971).

[154] Felstiner, *supra* note 150, at 76; Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 Law & Soc'y Rev. 95 (1974).

[155] *Legal Services Corporation Act: Hearings on H.R. 3719 Before the Subcomm. on*

Corporation,[156] assigned the responsibility of administering a legal services program, was a necessary legislative initiative to reduce implicitly mandated avoidance of the legal system by almost nineteen million Americans.[157] Although much more needs to be done, the importance of this initiative cannot be overemphasized.

In seeking a national program for the delivery of justice, the Department of Justice has recognized many of these factors. Through the Law Enforcement Assistance Administration, it funded experimental neighborhood justice centers in Atlanta, Kansas City, and Los Angeles. The twin goals of these centers are to provide an alternative to the local courts for settlement of many kinds of disputes that normally are shut out of the formal court system,[158] and further, to gather information about alternative dispute resolution techniques. Within the next few months, an independent evaluation will determine the most successful elements of this program.

Independent of this, Congress has developed legislation to create a dispute resolution resource center within the Department of Justice. The center would serve as a central clearinghouse for information on dispute processing techniques. In addition, the center would grant seed money to states, municipalities, counties, and private organizations to experiment with various dispute resolution procedures. This legislation recognizes that "for the majority of Americans, mechanisms for the resolution of minor disputes are largely unavailable, inaccessible, ineffective, expensive, or unfair";[159] that the inadequacy of dispute resolution mechanisms is against the general welfare of the people; and that neighborhood, local, or community-based dispute resolution mechanisms can provide means for expeditiously, inexpensively, and voluntarily resolving

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Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 48 (1977) (statement of Thomas Ehrlich).

[156] Pub. L. No. 93-355, 88 Stat. 378 (1974); Pub. L. No. 95-222, 91 Stat. 1619 (1977).

[157] H.R. REP. No. 95-310, 95th Cong., 1st Sess. 4 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4503, 4506; S. REP. No. 95-172, 95th Cong., 1st Sess. 3 (1977).

[158] Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 8 (1978); *see* Pound Conference Follow-Up Report, *supra* note 8, at 9-12.

[159] H.R. 2863, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1328 (daily ed. Mar. 13, 1979).

disputes.[160] These findings are steps in the right direction. If this legislation is enacted, after several years of experimentation, more will be known about the feasibility of providing alternative forums for the fair and expeditious resolution of disputes, where the alternative institutions should be located, and who should organize and control them.[161]

Conclusion

In spite of the fact that article III of the Constitution vests the judicial power of the United States "in one Supreme Court" and in "inferior" lower federal courts, the framers of the Constitution specifically authorized Congress to organize the Supreme Court, to establish the lower courts, and to distribute jurisdiction among them. In addition, article I vests in the legislative branch power to constitute tribunals inferior to the Supreme Court. And, the Supremacy Clause of the Constitution, by mandating that state courts share with their federal counterparts responsibility for enforcing the Constitution and the laws of the United States, gives Congress a very real interest in the quality of state-administered justice. These grants of authority have provided Congress with the significant responsibility of overseeing the functioning of the federal courts, as well as taking more than a passing interest in state justice systems. The genius of the founding fathers is that they balanced this broad legislative power by granting independence to the federal courts and tenure "during good behavior" to the judges who sit on these courts. In essence, the framers made it exceedingly difficult to change the basic judicial system or to remove federal judges.[162]

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[160] *Id.* Who controls the dispute resolution mechanism is an issue of great concern. The House bill recognizes the importance of community-based justice and citizen empowerment. *See Hearings on the Dispute Resolution Act*, *supra* note 71, at 131 (statement of Raymond Shonholtz); Hofrichter, *Justice Centers Raise Basic Questions*, 2 New Directions in Legal Services 168 (1977).

[161] For further discussion of developments in dispute processing outside the courts, *see* Johnson, Kantor & Schwartz, Outside the Courts: A Survey of Diversion Alternatives in Civil Courts (1977); *see also* notes 70 to 74 and accompanying text *supra*.

[162] A discussion of judicial tenure or discipline legislation, important as it may be, is outside the scope of this article. Even the best judges cannot be expected to overcome the inadequacies of an irrational and inconsistent judicial structure.

From a policy standpoint this is a two-sided coin. First and foremost, it prevents the executive and legislative branches from encroaching upon the power of the judiciary. In this regard, the sanctity of the judicial branch is constantly protected. The rule of law stands firm and rule by fiat becomes an impossibility. On the other hand, it makes it abundantly more difficult to aid the courts legislatively when their dockets become congested and their machinery needs fine-tuning. In this context, distance from the political branches works to the judiciary's detriment. Essentially, what is a strength in our democratic system of government — provision for an independent, anti-majoritarian check to the excesses of the executive and legislative branches, as well as abuses committed by private parties — becomes a weakness when it comes time to provide the judiciary with the necessary tools to accomplish its assigned functions.

In the end, issues relating to court reform and access to justice are political questions.[163] This proposition gives rise to a second set of problems. Where is the political constituency for court reform and access to justice? How is the legislator to measure support or opposition to a particular proposal? Who

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> It has been suggested that no court system can work with bad judges and that good judges can make any system work. Without challenging this piece of "conventional wisdom," it must also be added that a good court structure will maximize the quality and quantity of judicial output, minimize administrative complexities and costs, and promote confidence in the judicial system.

CITIZEN'S STUDY COMMITTEE ON JUDICIAL ORGANIZATION, REPORT TO [WISCONSIN] GOVERNOR PATRICK J. LUCEY 65 (1973).

[163] The Senate's recent action in attaching a school prayer amendment to S. 450 (the bill to eliminate the mandatory jurisdiction of the Supreme Court) is a stark reminder of this basic point. For further discussion of S. 450, *see* notes 123 to 128 and accompanying text *supra*. The prayer (Helms) amendment first had been attached to the Department of Education bill. Then, the Senate leadership, having decided that this action "endangered" the education package, looked for a "more appropriate vehicle" to which the school prayer issue could be linked. They ultimately found a widely supported and relatively non-controversial bill to provide needed relief to the Supreme Court of the United States. 125 CONG. REC. S4138-57 (daily ed. April 9, 1979). Their choice was clear; they would "endanger" this latter legislative proposal to save the education bill.

Politically, this action has two ramifications. First, a policy decision has been made that creating the Department of Education is more important than improving the operation of the United States Supreme Court. Second, a Senate precedent is established allowing alteration of the jurisdiction of the Supreme Court in other controversial areas (e.g., desegregation, abortion, obscenity) in an effort to control the substantive outcome of a case. *Id.* (remarks of Edward M. Kennedy and Charles McC. Mathias, Jr.).

does he turn to for political advice? In this regard, members of the legal profession form an intelligent, articulate, interested, and vocal political community. They not only speak for themselves individually, but they also often organize into associations and then speak with a more unified voice. Nonetheless, they hardly ever voice the concerns of the common man, who is rarely heard from. In the long run, lawyers tend to look after their own interests. A personal injury attorney will protest vehemently against no-fault insurance or abolition of diversity jurisdiction. Similarly, a tax lawyer will not support legislative proposals to end forum shopping in tax cases.[164]

What is fatally lacking for the policymaker is an overview of the entire system and the needs of all its participants. To solve the serious problems posed by delay, costs, and unfairness, this is what is needed. The Department of Justice's Office for the Improvements in the Administration of Justice, under the able leadership of Daniel J. Meador, has filled a gaping chasm in this area. So have several conferences and commissions which have met and issued reports during the past decade. So, although they represent specialized interest groups, have the Judicial Conference of the United States, the Conference of (State) Chief Justices, and the American Bar Association.

Aid from these groups only partially relieves the crushing burdens on Congress. We live in a rapidly growing and ever-changing society. Inexorably, life in the modern, technological state gives rise to new problems and societal tensions. A short list of subjects which concern the citizenry in 1979 makes this patently clear: industrial pollution, electronic surveillance, bank privacy, occupational safety, consumer credit protection, consumer product safety, freedom of information, and resource preservation. None of these items was of political or judicial concern over fifty years ago. Since 1969, Congress has passed over fifty substantive statutory schemes that confer jurisdiction on the federal courts. The Ninety-sixth Congress will not change the trend of giving the federal judiciary more and more to do: codification of the criminal laws, appellate review of sentences, and protection of insurance and medical records are possibilities for enactment.[165] Similar pressures are placed on the state courts to protect the environment, to provide equal treatment for all citizens, to enforce the criminal laws, to conserve energy, to guarantee the rights of consumers, to protect institutionalized persons, and to provide fair, expeditious, and inexpensive dispute resolution procedures.

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[164] Almost two centuries ago, Alexis de Tocqueville observed: "It must therefore be expected that personal interest will become more than ever the principal if not the sole spring of men's actions." 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 123-24 (Reeve trans., Bowen & Bradley rev. ed. 1976). Likewise, judges cannot be counted upon to deal with the issues raised by substantial revision of the federal system. P. CARRINGTON, G. MEADOR, M. ROSENBERG, JUSTICE ON APPEAL 224 (1976).

The twentieth-century industrial state daily brings to mind the reality that most of our resources are finite. Allocation of finite commodities has become a problem for the legislative and executive branches. If it is not done properly, waste occurs and the Proposition 13 reaction results. Special interests emerge recommending that everybody's interests but their own be curtailed. These suggestions tend to cancel each other out, leaving the legislative branch in a near-paralyzed position.[166]

To the extent that the practicing bar is warned about changing a legal system with which it feels so comfortable, a parting word is necessary. We live in a world where change is

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165 The Ninety-fifth Congress continued the trend of providing federal court remedies and judicial review in a wide variety of federal statutes to meet the varying needs of American society. Thirteen public laws authorized the United States to enforce statutory schemes through civil actions. *See, e.g.*, Pub. L. No. 95-213, § 104, 91 Stat. 1494 (1977) (Foreign Corrupt Practices Act); Pub. L. No. 95-339, § 105, 92 Stat. 460 (1978) (New York City Loan Guarantee Act); Pub. L. No. 95-372, §§ 208, 302, 312, 92 Stat. 1824 (1978) (Ethics in Government Act). In addition, the Ninety-fifth Congress enacted six laws creating private causes of action. *See, e.g.*, Pub. L. No. 95-511, § 103, 92 Stat. 1783 (1978) (Foreign Intelligence Surveillance Act), which regulates the use of electronic surveillance within the United States for foreign intelligence purposes. The legislation requires the Chief Justice of the United States to designate seven district court judges from seven circuits to constitute a court which has jurisdiction to hear applications for and grant orders approving foreign intelligence electronic surveillance. The Chief Justice also must appoint three circuit or district judges to constitute a court of review. Then, the Supreme Court acts as the final appellate arbiter.

One federal judge has characterized Congress' passion for judicial review as a love affair which is heating up rather than cooling down. McGowan, *Congress and the Courts*, 62 A.B.A.J. 1588, 1589 (1976). It appears that this love affair has turned into a stable relationship with long-term ramifications.

166 The controversy over the proposed abolition of diversity of citizenship jurisdiction provides a dramatic illustration of this.

To the extent that the practicing bar is worried about changing a legal system with which it feels so comfortable, a parting word is necessary. We live in a world where change is nature's mighty law; in fact, "change is one of the few things men can be certain of."[167] The role of law in our society always has been to organize, redirect, and legitimate changes that started outside the law. Life in the United States has been in constant flux since the end of World War II, and indeed, since the last major judicial reforms were consummated in the 1920s. It is a tribute to the existing judicial system, and to the lawyers who toil in it, that it has worked as well as it has. As Professor Hurst has observed, "Any institution whose job it is to deal directly, in as rational a way as possible, with the ceaseless flux, is to be counted one of the truly basic instruments of civilized living."[168]

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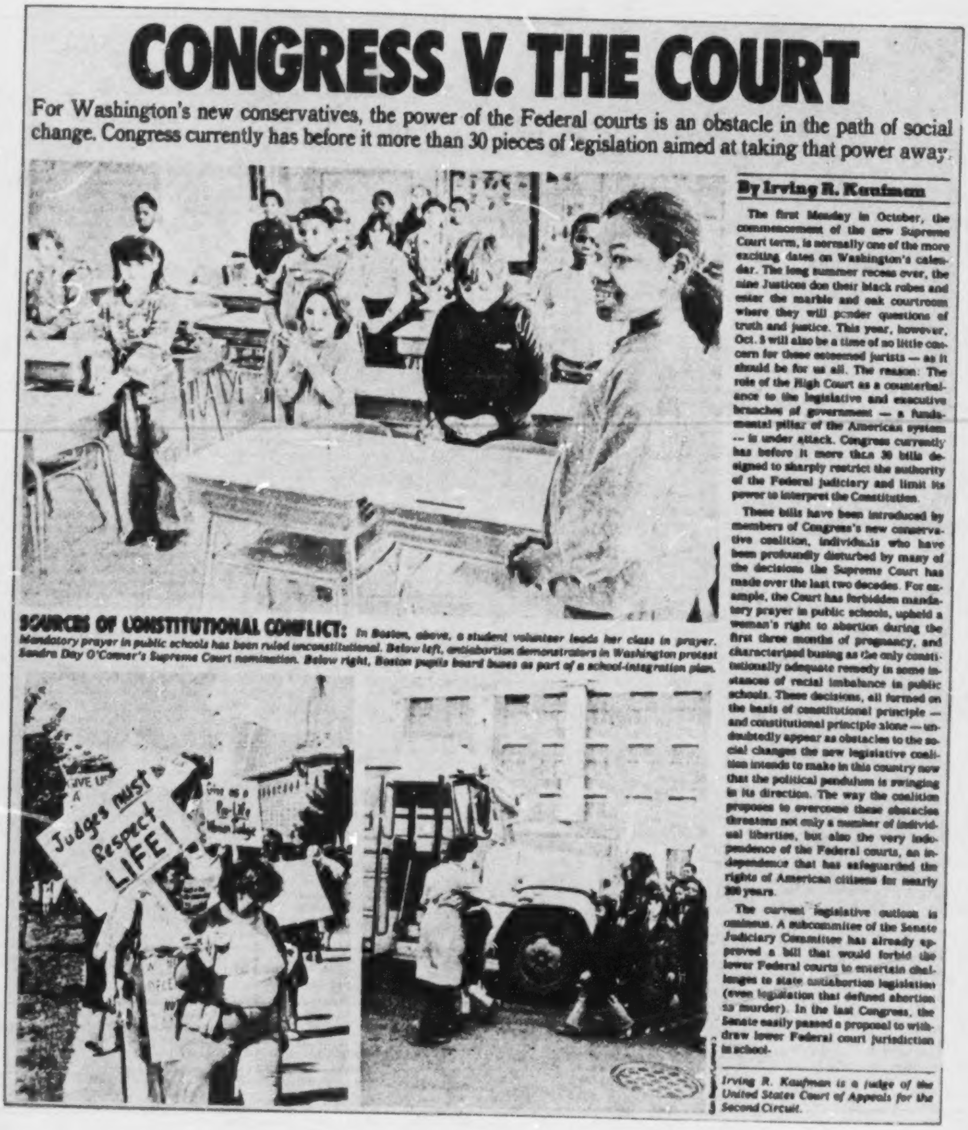
[167] J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 19 (1950).

[168] *Id.*


Judges must Respect LIFE!

CONGRESS V. THE COURT

For Washington's new conservatives, the power of the Federal courts is an obstacle in the path of social change. Congress currently has before it more than 30 pieces of legislation aimed at taking that power away.

By Irving R. Kaufman

The first Monday in October, the commencement of the new Supreme Court term, is normally one of the more exciting dates on Washington's calendar. The long summer recess over, the nine Justices don their black robes and enter the marble and oak courtroom where they will ponder questions of truth and justice. This year, however, Oct. 5 will also be a time of no little concern for these esteemed jurists — as it should be for us all. The reason: The role of the High Court as a counterbalance to the legislative and executive branches of government — a fundamental pillar of the American system — is under attack. Congress currently has before it more than 30 bills designed to sharply restrict the authority of the Federal judiciary and limit its power to interpret the Constitution.

These bills have been introduced by members of Congress's new conservative coalition, individuals who have been profoundly disturbed by many of the decisions the Supreme Court has made over the last two decades. For example, the Court has forbidden mandatory prayer in public schools, upheld a woman's right to abortion during the first three months of pregnancy, and characterized busing as the only constitutionally adequate remedy in some instances of racial imbalance in public schools. These decisions, all formed on the basis of constitutional principle — and constitutional principle alone — undoubtedly appear as obstacles to the social changes the new legislative coalition intends to make in this country now that the political pendulum is swinging in its direction. The way the coalition proposes to overcome these obstacles threatens not only a number of individual liberties, but also the very independence of the Federal courts, an independence that has safeguarded the rights of American citizens for nearly 200 years.

The current legislative outlook is ominous. A subcommittee of the Senate Judiciary Committee has already approved a bill that would forbid the lower Federal courts to entertain challenges to state antiabortion legislation (even legislation that defined abortion as murder). In the last Congress, the Senate easily passed a proposal to withdraw lower Federal court jurisdiction in school-

SOURCES OF CONSTITUTIONAL CONFLICT: *In Boston, above, a student volunteer leads her class in prayer. Mandatory prayer in public schools has been ruled unconstitutional. Below left, antiabortion demonstrators in Washington protest Sandra Day O'Connor's Supreme Court nomination. Below right, Boston pupils board buses as part of a school-integration plan.*

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prayer cases. A discharge petition to move the bill from the House Judiciary Committee to the floor failed by only 32 votes. The bill has been reintroduced and its chances for passage are rated better in this year's Congress. Other bills which would take from the Supreme Court the power to revise state and lower Federal court decisions in school prayer, abortion and busing cases, are now wending their way through the Senate-House Judiciary Committees.

Legal experts from all sections of the political spectrum have begun stepping forward to denounce these proposals. The American Bar Association calls them a danger to the fundamental system of checks and balances. And Prof. Laurence H. Tribe, of the Harvard Law School, has gone so far as to characterize one of the bills as "too palpably unconstitutional to permit reasonable persons to argue the contrary." Still, the possibility that some of these bills may be enacted into law cannot be dismissed. If that should happen, the Supreme Court would either have to accept the Congress's mandate or adjudicate the constitutionality of the laws. If the Supreme Court then decided that the laws were, indeed, unconstitutional, it would be up to Congress either to back down or to permanently reduce the Court's power through constitutional amendment.

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Such dilemmas have come close to occurring in the past. Today, it is the conservative wing that is attempting to circumscribe the Court's historical role. At other times in the past, the attack against the Court has been led by liberal reformers — while conservatives stood as sentinels guarding the sanctity of the Constitution. In the early 20th century, the Court struck down many pieces of legislation that sought to promote social change, including laws regulating child labor, setting minimum wages and maximum hours, forbidding the use of injunctions in labor disputes, and providing compensation for accident and illness. In response, liberals, and progressives led by Robert M. La Follette, attacked not only the concept of judicial review but the judges themselves. Statutes were introduced in Congress to require the votes of at least six justices to invalidate legislation, and some Congressmen supported constitutional amendments that would have mandated the popular election and recall of Federal judges.

Some years later, after the Supreme Court invalidated much New Deal legislation, President Roosevelt proposed a bill that would have allowed him to increase the Court's membership. Had that bill passed, Roosevelt would have been able to "pack" the Court with political allies, insuring that it would always decide as he saw fit. Fortunately, that plan died in the Senate Judiciary Committee.

Efforts to curb the courts have, if anything, become more frequent in recent years, and they have been proposed by politicians of almost all political stripes. After the Supreme Court's 1954 decision in *Brown v. Board of Education*, which declared an end to the purposeful segregation of public schools, a number of bills were introduced in Congress proposing to remove all Federal court jurisdiction in desegregation cases. At about the same time, the call for popular election of Federal judges was renewed. Later, in 1958, at the height of the cold war, serious and widespread support gathered for a bill that would have overturned Supreme Court decisions guaranteeing First Amendment freedoms to political dissidents by removing appellate jurisdiction in cases involving alleged subversive activity. And in 1964, the House of Representatives (but not the Senate) passed a bill that would have deprived the Supreme Court and the lower Federal courts of the power to hear cases regarding enforcement of the Court's new rule of one-man, one-vote for apportionment of state legislatures, a rule that was intended to redress inequities in voting strength caused by racial animus. The reapportionment decisions spurred a furious attack on the Court led by proponents of states' rights, some of whom went so far as to propose that a "Court of the Union," composed of the Chief Justices of all the states, be established to review the decisions of the Supreme Court.

All the bills under consideration this year invoke the concept of jurisdiction, the basic authority of a tribunal to decide a case. Sponsors of the bills cite Article III of the Constitution, which assigns to Congress the power to define and regulate the jurisdiction of all Federal courts including the Supreme Court. Using this power, the Congress has, for example, denied Federal judicial authority in some cases involving lawsuits for less than $10,000. No one questions the legitimacy of that restriction. So why, the sponsors ask, can Congress not also declare, as one bill does, that "the Supreme Court shall not have jurisdiction to review . . . any case arising out of any State statute, ordinance, rule or regulation . . . which relates to abortion?" The answer is not simple. It rest on an understanding of the scope of Congress's authority over the jurisdiction of the Federal courts, which, in turn, depends on an understanding of the Constitution and the role the Constitution mandates that the Federal courts play in the American system.

The framers and early expositors of the Constitution did not fear the power of the courts. With no innate authority either to enforce its own judgments or to control the purse strings, the judiciary was expected to be the weakest of the three branches of government. It was rather the legislative branch that the framers felt a need to restrain. Steeped in English parliamentary history, they knew the dangers of legislative tyranny. James Madison, the principal architect of the Constitution, observed: "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

The framers set up the Federal court system as one means of checking the Congress. Using the power of judicial review, the courts would invalidate any legislative acts that were inconsistent with the strictures of the Constitution. The theory was, and still is, that Congress should exercise only a delegated authority, derived from the people. The Constitution, in contrast, was intended to represent the actual embodiment of the people's fundamental and supreme will. Thus, when presented with a case in which a legislative act contravenes the constitutional mandate, it is the duty of the courts to uphold the latter. "To deny this," said Alexander Hamilton, "would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves."

The Supreme Court has therefore struck down laws passed by Congress that conflict with the Constitution ever since the landmark 1803 case of *Marbury v. Madison*. For almost as long, the Court has invalidated constitutionally offensive state statutes as well. That duty, scholars insist, is grounded in Article VI of the Constitution, which commands: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."

It was inevitable that the judiciary, of the three branches of government, would be charged with the responsibility of assessing the constitutional validity of legislation. To insure the judiciary's ability to perform this sensitive duty faithfully and neutrally, the framers deliberately shielded the judges from political pressures by guaranteeing them, within the Constitution itself, life tenure, and by further providing that their salaries could not be diminished through legislative act. Their independence, to quote Hamilton again, would insure "that inflexible and uniform adherence to the rights of the Constitution, which we perceive to be indispensable in the courts of justice."

This is not to say that the Federal courts' judgments relating to the the constitutionality of legislation — including legislation on such issues as abortion, school prayer and busing — cannot be overridden. An unpopular Supreme Court decision on a constitutional issue can be overturned through a constitutionally prescribed means: an amendment to the Constitution. In fact, three times amendments have been proposed and ratified as a way of nullifying controversial Supreme Court decisions. (The 11th Amendment, which forbids a suit in Federal court against a state without its consent, was adopted to overrule a 1793 holding that the Supreme Court had jurisdiction over a case brought by two South Carolinians against the State of Georgia. In 1868, during the Reconstruction period following the Civil War, the 14th Amendment was enacted. This amendment, which proclaims that all persons born in the United States are full citizens of the United States, with all "rights and immunities" of citizens, overruled the infamous Dred Scott decision of 1857, which had declared that black slaves, as no more than pieces of property, lacked the rights of citizens. Finally, in 1913 the 16th Amendment was adopted to overturn a Supreme Court decision holding that the Federal income tax was unconstitutional.)

Constitutional amendments, however, are not a means most critics of the Court are eager to employ to bring about the changes they seek. Their passage requires a cumbersome procedure of ratification — as supporters of the proposed equal rights amendment well know. The framers deliberately made the amendment process cumbersome because they did not want expediency to prevail over constitutional rights. They believed that any alteration of the fundamental law of the land should enjoy the overwhelming and sustained support of the citizenry. A simple majority in both Houses of Congress, sufficient to pass the ordinary statute, should not be enough to justify permanent changes in the nation's charter of basic freedoms.

Herein lies the tactical appeal of the withdrawal-of-jurisdiction strategem. Many supporters of the 30 or so divestiture bills now before Congress freely admit that they are attempting to bypass the amendment process. Their rationale is simple: Since the popular support to override Court decisions by amending the Constitution is difficult to garner, why not accomplish the same result with a simple statute restricting the power of the courts to consider the constitutional principles they dislike? In 1964, following the Supreme Court's landmark decision on legislative reapportionment, Senator Everett M. Dirksen introduced a bill to withdraw Federal court jurisdiction in apportionment cases. When asked whether he was attempting to enact a constitutional amendment in the form of a statute, he responded: "[There is] no time in the present [legislative] session to do anything with a constitutional amendment. . . . We are dealing with a condition, not a

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theory." A candid and revealing response, then as now.

The rationale of our Constitution is not to be lightly ignored. It was designed to protect individual rights by vesting the Federal courts with the final, binding authority to interpret the fundamental law. The only way to override the Constitution as so interpreted is to amend it. The backdoor mechanism of withdrawing the Court's jurisdiction is clearly antithetical to the judiciary's role in the constitutional scheme. If the bills depriving the Court of the authority to hear cases on such topics as abortion, school prayer and busing are considered constitutional, Congress might just as well pass laws depriving the Court of the authority to hear constitutional claims based on such freedoms as speech and religion. The potential consequences are astonishing.

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There is another contention being put forward by the proponents of the withdrawal-of-jurisdiction bills that needs to be discussed. These legislators note that the Constitution states that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." The "exceptions-and-regulations" clause, they argue, grants Congress wide-ranging authority to restrict the substantive categories of cases that may be appealed from the state and lower Federal courts to the Supreme Court. But to assert that the framers, who clearly intended the Supreme Court to exercise the power of judicial review, also intended to grant Congress plenary authority to nullify that power is to charge the framers with baffling self-contradiction. Indeed, the history of the exceptions-and-regulations clause suggests that it was never intended to carry the heavy constitutinal baggage with which the bill's supporters are now loading it.

The clause originated in the fears of some members of the Constitutional Convention that Supreme Court review of factual determinations (appellate review was to be "both as to law and fact") would impair the right-of-jury trial in the states. Hamilton stated: "The propriety of this appellate jurisdiction has scarcely been called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact." Since the practices with respect to appellate review of factual determinations varied so widely from state to state, the framers decided to leave to Congress, in the exceptions-and-regulations clause, the authority to regulate the scope of Supreme Court review of facts.

The clause was never meant to confer a broad control over appellate review of substantive legal issues, including issues of Federal constitutional law. Indeed, the Convention considered and rejected proposed constitutional language that "the judicial power shall be exercised in such manner as the legislature shall direct." Far from a mandate to effectively abrogate the vindication of constitutional rights, the clause was intended merely as a way to give Congress the authority to regulate the Supreme Court's docket with reasonable housekeeping measures. Thus, in the Judiciary Act of 1789, Congress restricted the Court's appellate jurisdiction over cases coming from the United States Circuit Courts to those in which the amount in controversy exceeded a prescribed minimum.

On only two or three occasions in its history, has the Supreme Court passed upon the constitutionality of legislation seeking to limit its appellate jurisdiction. Both cases occurred over a century ago and both reveal constitutional defects in the current proposals relating to jurisdiction. In the first case, *Ex parte McCardle*, decided in 1869, the Court upheld a restriction on its appellate jurisdiction. Although relegated to a small niche in history, this case was enormously important in its day, for it involved a challenge to the post-Civil War Reconstruction program, in which Congress had placed 10 of the former Confederate states under military rule. McCardle had been imprisoned by the military government of Mississippi for the publication of allegedly libelous material. Pursuant to a Federal statute passed in 1867, he applied to a lower Federal court for a writ of *habeas corpus* ordering his release. He asserted that the Reconstruction Acts were unconstitutional. The court denied his application, and he appealed to the Supreme Court on the basis of that same Federal statute. Before the case was decided by the Court, however, Congress repealed that part of the 1867 statute which authorized appeals to the High Court. "We are not at liberty to inquire into the motives of the legislature," the Court held. "We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of the Court is given by express words."

Despite this pronouncement, the McCardle case is not ordinarily read as authority for a broad Congressional power to restrict the enforcement of constitutional rights in the Supreme Court. Under the Judiciary Act of 1789, McCardle could still apply for an original writ of *habeas corpus* in the Supreme Court. Therefore, the repealing act actually cut off only one avenue of *habeas relief*. The Court concluded as much in the 1869 case of *Ex parte Yerger*, a case that was in many ways strikingly similar to *McCardle*. Yerger held that the repealing statute did not affect the petitioner's right to apply for an original writ pursuant to the act of 1789. In contrast with the statute under consideration in *McCardle*, the bills that would forbid any Supreme Court review of busing, school prayer and abortion decisions would totally foreclose the possibility of a Supreme Court hearing on a claim of Federal constitutional right. Surely, *McCardle* cannot be considered a precedent for that.

This view is confirmed by *United States v. Klein*, decided in 1872, in which the Court struck down a limitation on its powers of appellate review. Klein administered the estate of a cotton plantation owner whose property was seized and sold by Union agents during the Civil War. Under legislation providing for recovery of seized property of noncombatant rebels upon proof of loyalty, Klein sued and won in the Court of Claims, proferring a Presidential pardon as proof of loyalty. The Court had previously interpreted a Presidential pardon as carrying with it a proof of loyalty. But pending the Government's appeal to the Supreme Court, Congress passed an act which legislated that acceptance of a pardon was, on the contrary, conclusive proof of disloyalty and one which, in addition, required the Supreme Court to dismiss for want of jurisdiction any appeal in which the claim for recovery was based on a pardon.

Invalidating that legislation, the Court concluded that Congress had unconstitutionally attempted to interfere with the Court's duty to interpret and give effect to a provision of the Constitution: "The language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny pardons granted by the President the effect which this Court had adjudged them to have. The proviso declares that pardons shall not be considered by this Court on appeal. We had already decided it was our constitutional duty to consider them and give them effect, in cases like the present, as equivalent proof of loyalty."

In a similar manner, the current withdrawal-of-jurisdiction proposals do "not intend to withhold appellate jurisdiction except as a means to an end." And the end, in this instance, is precisely the same as it was in *Klein*, the circumvention of the Supreme Court's authoritative interpretation of a constitutional provision. As *Klein* demonstrates, Congress does not have the power to subvert established constitutional principles under the guise of regulating the Court's appellate jurisdiction.

Those who would read the exceptions-and-regulations clause broadly also argue that state courts, which frequently rely on the Federal Constitution in striking down state legislation, could adequately protect constitutional rights without review in the Supreme Court. The short answer to this contention is that a Federal constitutional right is of dubious value if it means one thing in Mississippi and another in Minnesota. State courts have at times differed profoundly on the meaning of constitutional provisions. To cite but one illustration, in 1965, the Supreme Judicial Court of Massachusetts concluded that the book "Fanny Hill" was unprotected by the First Amendment. At about the same time, the New York Court of Appeals found that it was. Obviously the need for uniformity in matters of Federal constitutional interpretation is essential, and the appellate jurisdiction of the Supreme Court was designed to meet that important need. Chief Justice John Marshall said in *Cohens v. Virginia*: "The necessity of uniformity as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of deciding, in the last resort, all cases in which they are involved. . . . [The framers of the Constitution] declare that, in such cases, the Supreme Court shall exercise appellate jurisdiction."

In connection with this uniformity function, there is an interesting tale concerning one of the most eminent jurists in American history, Judge Learned Hand of the United States Court of Appeals for the Second Circuit. In 1958, at the ripe age of 86, Hand, still nimble of mind and capacious of spirit, was asked by Senator Thomas C. Hennings Jr. of Missouri, chairman of the Senate Judiciary Subcommittee on Constitutional Rights, to comment upon a then-current bill to remove Supreme Court appellate jurisdiction in cases regarding internal security. Hand promptly responded: "It seems to me desirable that the Court should have the last word on questions of the character involved. Of course there is always the chance of abuse of power wherever it is lodged, but at long last the least contentious organ of government generally is the Court. I do not, of course, mean that I think it is always right, but some final authority is better than unsettled conflict."

It should also be self-evident that the framers saw independent, tenured Federal judges — knowledgeable in Federal law, drawn from all over the country and, as prescribed in the Constitution itself, appointed by the President and confirmed by the Senate — as more appropriate arbiters of conflicts between constitutional and state law than elected state judges, many of whom are popularly elected and who might be partial to state law. The framers realized that only the Federal judges could insure the supremacy of Federal law. As James Madison said: "In controversies relating to the boundary between the two jurisdictions [Federal and state], the tribunal which is ultimately to decide is to be established under the general Government. . . . Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact."

□

The argument for giving Congress the authority to determine the kinds of cases and the types of remedies that the inferior Federal courts may hear is a bit more complicated — if equally unpersuasive. It too is based on Article III of the Constitution, which gives Congress the right to establish "such inferior courts as the Congress may from time to time ordain and establish.'' Since this provision has been interpreted by many legal experts as giving Congress the right to establish or abolish the lower courts, does it not follow that it also gives Congress the authority to regulate the subject matter of their jurisdiction? The fallacy of this argument is that the framers predicated Congressional discretion on the assumption that litigants would in all cases be able to present their Federal claims or defenses to some Federal court, either in the district court or on appeal. And it was further assumed that, even if no lesser Federal courts were created, the Supreme Court itself would serve as the requisite forum by hearing all constitutional cases appealed from the state courts.

When the American people have recognized Congressional court-curbing efforts for what they are — assaults on the Constitution itself — they have in every instance rejected them.

Throughout most of the 19th century, this was possible. The Court's docket was almost empty by today's standards and it could ordinarily hear a constitutional case any time one of the parties so desired. But beginning about 1875, the Supreme Court's case load began to grow enormously, giving rise to a series of acts, culminating in the Judges Bill of 1925, which gave the Court the discretion to decide which cases, within certain categories, it would hear. In the process, the Supreme Court was transformed from a general court of appeal into a court which would decide only cases of great constitutional moment or high precedential value.

As the Supreme Court has found itself deciding a progressively smaller percentage of the cases involving Federal, constitutional and statutory law, the role of the lower Federal courts in protecting constitutional rights has expanded to the point of practical and effective primacy. And over the last two decades, a period during which there has been an explosive growth of litigation, the inferior Federal courts have become, in most instances, the only forums in which a litigant could secure a decision on his constitutional claims by a judge life tenured under Article III of the Constitution. If Congress were now to abolish the lower Federal courts, it would effectively cut off almost all opportunity for Federal adjudication of Federal rights. And clearly, the framers did not wish to leave to the states final authority to decide matters of Federal constitutional law. For this reason, the argument that Congress can withdraw jurisdiction over certain classes of Federal cases or rights because it has discretion to abolish the lower courts does not hold up under examination.

Authoritative precedent also strongly suggests that even if Congress had the power to abolish some or all of the lower Federal courts, it may not use its power over lower court jurisdiction to thwart the vindication of constitutional rights. The Court of Appeals for the Second Circuit said in Battaglia v. General Motors Corporation, decided in 1948, that, ''while Congress has the undoubted power to give, withhold and restrict the jurisdiction of courts . . . it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law.'

□

The conclusion that can be drawn from all of these arguments is this: Congress does indeed have broad discretion to withdraw jurisdiction from lower Federal courts — where no substantive constitutional rights are at issue. The statutory rights that owe their existence to Congress, as distinguished from constitutional rights, may be taken away either by a repealing statute or by a provision withdrawing Federal court jurisdiction. Where rights embodied in the Constitution are concerned, however, the discretion of Congress is limited. When Congress deprives a Federal court of the authority to hear a litigant's constitutional claims or defenses, it must provide that litigant with another Federal forum in which to seek an adequate remedy. The distinguished legal scholar Henry Hart once decried the use of statutes withdrawing lower court jurisdiction to undermine constitutional rights: ''Why, what monstrous illogic! To build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction! And into a power to do it in contradiction to all the other terms of the very document which confers the power to regulate jurisdiction!''

Applying these lessons to the divestiture bills now before Congress, there can be no doubt that all of them trench upon established constitutional rights. The Supreme Court has determined that busing may be a constitutionally required remedy in an appropriate case for violations of schoolchildren's equal-protection rights to an education in a desegregated public school. Chief Justice Burger has written for the Court: ''Bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.'' In the landmark case of *Roe v. Wade*, the Court firmly established a woman's constitutional right to an abortion. And for nearly two decades, the Court has found mandatory prayer in the public schools to violate the constitutional principle of separation of church and state.

One may disagree with these decisions; they may even transgress one's deepest moral convictions. But one cannot doubt that they were based upon informed interpretation of the Constitution — and not on the basis of political or ideological expediency. It is worth recalling the pungent words of Chief Justice Charles Evans Hughes: ''We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.'' Depriving the Federal courts of the power to adjudicate cases relating to such issues as desegregation, abortion and school prayer effectively precludes Federal protection — the constitutionally envisaged and most reliable form of protection — of our cherished constitutional rights.

The result of the proposed legislation would be to deny citizens the protection of constitutional rights that the Supreme Court has declared they possess. It would be strange indeed if Congress could accomplish through a jurisdictional bill what it clearly may not accomplish directly: a reversal of constitutional principle by an act of Congress. The law is clear, for example, that Congress has no power to declare racial discrimination in Federal Government employment legal. The ''logic'' of the arguments raised by the proponents of the divestiture bills would, however, permit Congress to remove from the Federal courts all jurisdiction to hear cases involving racial discrimination against Government employees. The motive, discrimination, would be equally patent in either instance.

If one needs to find language in the Constitution as a source for these restrictions on the power of Congress to control the jurisdiction of the lower Federal courts, it is in the due-process clause of the Fifth Amendment. The overarching guarantee of due process is the sacred assurance that the Federal Government will govern fairly, impartially and compassionately. All the powers of Congress — to tax, to make war, to regulate commerce — are constrained by its constitutional inability to deprive us of our rights to life, liberty and property without due process of law. As a power of Congress, the authority to control jurisdiction is therefore restricted by the right of due process. That is the wonder of the American Constitution as it lives and breathes.

Should Congress insist upon restricting the judiciary in ways that the Supreme Court may view as unconstitutional, the Supreme Court might well strike down the withdrawal-of-jurisdiction legislation, leaving Congress and the judiciary in conflict. This institutional dissension would continue, until Congress either accepted the Court's determination or passed a constitutional amendment restructuring the basic relationship between the judicial and legislative branches of government.

□

It is understandable that politically vulnerable legislators would react adversely to judicial nullification of their enactments. Yet those who criticize the courts for their unresponsiveness to the present national mood tend to forget that the judicial branch was not designed as just another barometer of current public opinion. Congress is superbly adequate for that function, and we ought not to presume that the framers intended the judiciary as an institutional redundancy. In exercising their power of judicial review, the courts have represented the long-term, slowly evolving values of the American people, as enshrined in the Constitution. And when the people have recognized Congressional court-curbing efforts for what they are — assaults on the Constitution itself — they have in every instance rejected them.

> *Should Congress pass these bills, the Court* might well strike them down, leaving the two branches of government in conflict. Congress would then have to either back down — or permanently reduce the Court's power through a constitutional amendment.

It is of no small interest that even some of the supporters of the divestiture bills have begun to question the constitutionality of these proposals. And, indeed, there is a glimmer of hope that these doubts will eventually permeate Congress. The long history of Congressional court-curbing measures reveals that the legislative branch has in every instance ultimately yielded to the judiciary's duty to interpret the Constitution and has not (at least since passing the statute involved in the Klein case more than a century ago) challenged the courts with a jurisdictional bill that would infringe upon the fulfillment of that duty. Robert McKay, former dean of the New York University Law School, wrote of bills to withdraw jurisdiction over apportionment cases: "Once again, as so often in the past, when the implications of the proposed legislation were made clear, the Congress would not quite cross the threshold of no return."

The political risks attending bills to withdraw Federal jurisdiction create another check on the legislative goal of certain Congressmen. Groups of all persuasions have attempted to achieve their political aims through attacks on the Court's authority to decide constitutional cases. While it is true that political conservatives are the strongest supporters of the current efforts to withdraw jurisdiction, liberal reformers have also utilized this strategy in the past. Employed successfully by today's political majority, it could easily be manipulated tomorrow by a different majority — and to other ends.

In the final analysis then, while the current divestiture bills should be a cause for concern about the ability of our constitutional system to withstand the onslaught of restrictive legislation, there is also room for hope. In the long history of court-curbing efforts, the majority has always, in the end, acknowledged the clear intention of the framers. To preserve the rights of the people, the Federal judiciary must interpret and apply the Constitution unfettered by unseemly limitations on its jurisdiction. The current Congress is a body of distinguished and wise legislators who are unlikely to sacrifice the long-term good of the Republic for speculative and short-term political gain. As the New England poet James Russell Lowell once said, "Such power there is in cleareyed self-restraint." As the first Monday in October draws near, there is reason to believe that Congress will be instructed by the lessons of history and see that the constitutional powers of the highest court in the land — and of other Federal courts — should remain inviolate. ■

A MOST DEFERENTIAL TERM

In the term just past, the nine Justices made no waves. They deferred to the will of Congress, to the dictates of the sovereign states, to the authority of the Executive. Bye-bye judicial activism

Conservatism at the High Court

JAMES J. KILPATRICK

On the surface, it was a placid term of the U.S. Supreme Court that ended on July 2. The Court handed down 125 opinions, but none of them qualified as a landmark. Nothing came along in criminal law to rank with *Miranda*; nothing in the field of civil rights approached *Brown* v. *Board of Education*. Even in dissent, none of the Justices made waves.

The surface appearances were deceiving. Some critics have complained that the Court under Chief Justice Warren Earl Burger, like Churchill's famous pudding, has no theme —but the critics are wrong. Beneath the bland surface lie strong, consistent currents of jurisprudence. The activism that marked the days of Earl Warren, when the Court plunged into seas of political and social controversy, has been replaced by a cautious and respectful conservatism.

In the term just ended, we saw the most deferential Court in many years. The Court deferred to Congress; the Court deferred to the Executive. Praising the virtues of federalism, the Court deferred to the sovereign states. The Court even deferred, most of the time, to the federal bureaucracy. The Justices genteelly deferred to one another: Justice Thurgood Marshall dissented 43 times and Justice William Brennan 39 times, but these were feeble scores against the records racked up by William O. Douglas. Sixteen cases saw unanimous opinions; 23 others brought separate concurrences but no dissents. In only twenty cases did the Court split 5 to 4. Nearly half a century ago, Harlan Fiske Stone laid down the maxim by which the present Court is guided: "The only check upon our own exercise of power," he wrote, "is our own sense of self-restraint." That vital sense is working well.

Time after time, the Court bowed to the will of the Congress. In *Rostker* v. *Goldberg*, for example, the Court had to decide whether an act requiring the draft registration only of men discriminated against women. In the lower court, a three-judge panel had marshaled impressive reasoning to support that complaint. In the high court, a six-man majority tossed that reasoning aside. Speaking through Justice William Rehnquist, the majority held that the case was more than merely one more case involving "the customary deference accorded congressional decisions." Here the issue involved the authority of Congress over national defense and military affairs, "and perhaps in no other area has the Court accorded Congress greater deference." After all, Rehnquist added, admonishing his three dissenting brothers, "the Congress is a coequal branch of government whose members take the same oath we do to uphold the Constitution of the United States."

In *McCarty* v. *McCarty* a different six-man majority exhibited the same politesse. The case involved a property settlement between an army colonel and his wife of 19 years. Under California law, Patricia Ann McCarty was entitled to roughly half of the colonel's future retirement pay. Ah, said Justice Harry Blackmun, but the law of California must yield to the law of the land. An officer's retirement pay is not like a pension based upon past services; on the contrary, it is "reduced compensation for reduced current services." The retirement system is not designed for the benefit of divorced wives, but for the benefit of the armed services. The purpose is to encourage orderly promotion and to maintain a youthful military force. The value of retirement pay as an inducement to re-enlist would be diminished if an officer knew that he might be involuntarily transferred to a state that would divide that pay upon divorce. In its wisdom and compassion, to be sure, Congress could change the federal law, "but this decision is for Congress alone."

In *Monroe* v. *Standard Oil Company*, this deference to legislative power approached a comic level. This was one of the 5 to 4 decisions. Remarkably, *both* sides insisted upon upholding the perceived intent of Congress. The case involved a military reservist in Lima, Ohio. His reserve duties required attendance at monthly drills and summer camps, with the result that he lost some hours at the refinery where he worked. The majority said, Tough luck, but Congress has laid no duty upon employers to accommodate reservists. "This Court does not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibility of Congress." The four dissenters found this an "erroneous interpretation, contrary to congressional intent."

The Court bowed to Congress in a case involving Medicaid and in a case involving railroad retirement. Late in the term, the Court upheld the historic authority of the legislative

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On the conservative side we have been pleading for years for strict construction and judicial restraint. For a term or two, at least, we are getting what we asked for. It may be dull, but it's delightful, too

branch over our mailboxes: these can be used only for the deposit of stamped mail, and not for the distribution of the fliers of civic groups. Repeatedly the Court invoked the hoary doctrine that judges must not substitute their own notions of social policy for the expressed will of Congress. Judges have been saying this for years; they say it whenever their prejudices coincide with the expressed will of Congress. But in the term just ended, members of the Burger Court seemed to mean it.

In this regard the Chief Justice himself, in one notable case, led all the rest. This was the Florida case testing the use of television cameras in criminal courtrooms. Does the presence of a TV reporter prejudice a fair trial? It is well known that Burger loathes TV, but who wrote the opinion upholding Florida's right to experiment with TV coverage? The Chief in person.

The Florida case was one of several in which the old doctrines of federalism were defended. The Court upheld a Utah statute requiring physicians, if possible, to notify the parents of a teenaged girl seeking an abortion. The Court found nothing wrong with an Arizona law that departs from "one person/one vote" in water conservation districts. Minnesota's statute on milk containers placed no unconstitutional burden on interstate commerce. Montana's steep severance tax on coal, by the same token, was merely a manifestation of powers reserved to the states respectively under the Tenth Amendment. In Illinois, a complicated, slow, and cumbersome system of challenging real-property tax assessments nevertheless was found to be "plain, speedy, and efficient," and hence within the powers of Cook County. The friendly principles of federalism reached even to the closing of a city street in Memphis; the intent of the closing was not to segregate neighborhoods but only to move traffic.

To be sure, the term saw exceptions to this pervasive punctilio. Federalism did not protect an Iowa law limiting the length of trucks. A Connecticut procedure in paternity cases could not pass muster. The Borough of Mt. Ephraim in Camden County, N.J. was told it could not invoke its zoning power to prohibit nude dancing in a porn shop.

The delightful trend toward judicial restraint produced some ironies also. The Court deferentially upheld a tough federal law on strip mining, even though the law demands ridiculous results in the rugged mountain terrain of southwest Virginia. The Court bowed to federal authority in water pollution regulations, even if the regulations force some companies out of business. Textile manufacturers got the word that "feasible" in the law means "feasible" in practice, and never mind a balance between benefits and costs. Mine owners learned that nothing in the Fourth Amendment requires federal inspectors to get a warrant in advance. If business and industry are aggrieved by such exercises in strict construction, let them look to Congress for relief. Justices must not substitute their own notions of wise social policy, et cetera, et cetera, et cetera.

In the last few days of the term, the Court disposed of two cases that might have been raised to landmark dimensions. Both involved the power of the Executive. In *Haig* v. *Agee*, the Court almost matter-of-factly upheld the authority of a Secretary of State to revoke a passport for cause. The decision set off a loud but unwarranted flap within the liberal community, where dark perils were seen to freedom of speech and freedom to travel abroad. A careful reading of Burger's opinion for the seven-man majority makes it clear that Philip Agee's passport was revoked not for what the renegade said, but for what he did in trying to disrupt our intelligence-gathering capacity. In the Iranian assets case, without significant dissent the Court upheld President Carter's deal on the hostages—but Rehnquist's opinion was cast so narrowly that it provides no sweeping precedential authority for future cases.

So the term went. Nothing much happened in criminal law. In attempting to clarify Fourth Amendment questions of search and seizure and Sixth Amendment issues of a right to counsel, the Court succeeded in making matters more opaque. In the field of sex discrimination, the Court waffled; two cases sustained equal rights for women, two cases went the other way. No cases dealt significantly with freedom of the press or freedom of religion. The only case that dealt notably with these issues produced a splintered majority upholding the power of a state to restrict the Krishna cultists at state fairs.

The spirit of judicial restraint was reflected even in the dissents. Some of us who cover the Court may be forgiven a nostalgic sigh for the good old days when Black, Douglas, and Frankfurter hurled gutsy insults at each other. These days only Rehnquist flings the barbed remark. In a Jehovah's Witnesses case, he observed tartly that his erring brothers had succeeded only in "adding mud to the already muddied waters of First Amendment jurisprudence." In another case he accused the majority of "a remarkable feat of judicial alchemy." In a Kentucky criminal case he deplored the "singular paucity of reasoning" displayed by his colleagues. Tame stuff, tame stuff.

With the retirement July 3 of Justice Potter Stewart, some change can be expected in the fall term, but probably not much. We may reasonably anticipate the smooth confirmation of Mr. Reagan's nominee to replace him, Sandra O'Connor of Arizona. The Court's first woman comes fully credentialed as a Goldwater Republican, but history raises a flag of caution: nominees do not always turn out as appointing Presidents expect. Mr. Eisenhower, a moderately conservative fellow, wanted judges in his own image; he chose Harlan, Whittaker, and Stewart, who worked out well, but he also named Earl Warren and William Brennan to the bench. Mr. Nixon also wanted staunch conservatives; he got two splendid ones in Burger and Rehnquist; he got a moderate conservative in Powell, and these days it's hard to say what Mr. Nixon got in Harry Blackmun. During the past term, Blackmun broke 41 times from Burger and Rehnquist and disagreed 42 times with Brennan and Marshall. Mrs. O'Connor's judicial experience has been limited to construing the state law of Arizona, with little opportunity to grapple with federal statutes or with constitutional issues. She may prove to be another Rehnquist on the high court, but then again, she may not.

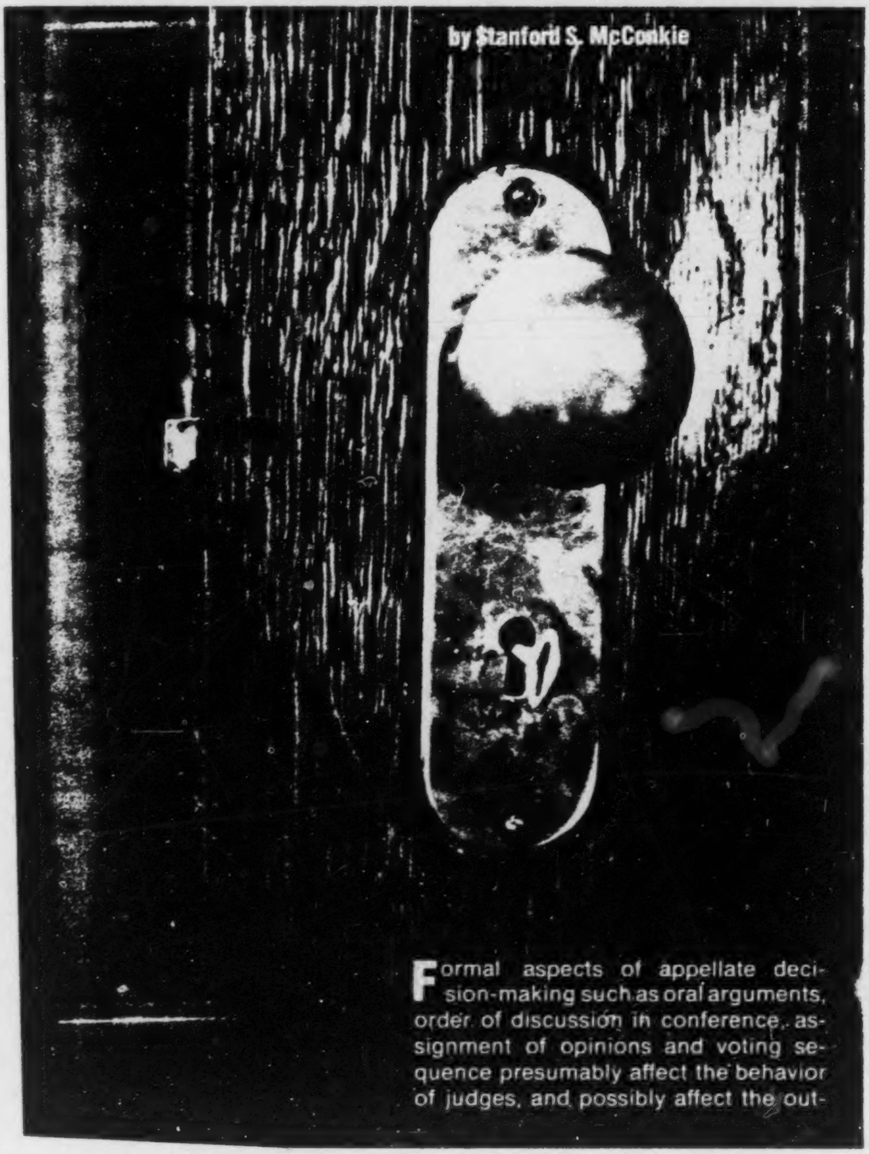
My guess is that the same currents and divisions that were so evident in the 1980-81 term will continue largely unchanged in the term that begins next October. Brennan is 75; Marshall just turned 73. The Court's two most liberal members disagreed in the past term on only ten of the 125 cases. At the other end of the spectrum sit Burger, who will be 74 in September, and Rehnquist, 57 in October. The two most conservative members disagreed in only 11 cases. Powell is rising 74, Blackmun is 72, White 64, and Stevens 61. They will continue to hold a middle ground. As for Madame Justice O'Connor—a title that will take some getting used to—we can only wait and see.

I would venture one forlorn hope, in looking to the future when some of the septuagenarians may be summoned to yet a higher court. This is that Mr. Reagan will search for replacements who possess some felicitous command of the English language. With occasional lapses into clarity, the eight returning Justices all write pedestrian prose. Rehnquist and Stevens now and then get off a luminous line, but the occasions are infrequent. Powell has the finest mind on the Court, but his opinions proceed at the methodical, measured pace of drying paint.

With those mildly dyspeptic observations, I remain content. On the conservative side, we have been pleading for years for strict construction and judicial restraint. For a term or two, at least, we are getting what we asked for. It may be dull, but it's delightful, too. ☐

A look inside the conference room

Decision-making in state supreme courts



by Stanford S. McConkie

Formal aspects of appellate decision-making such as oral arguments, order of discussion in conference, assignment of opinions and voting sequence presumably affect the behavior of judges, and possibly affect the out-

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come of cases.[1] Yet these procedures have been subjected to surprisingly little empirical investigation.[2] Wold, in his examination of four state supreme courts, concluded that procedures do affect decisions, though in a more limited way than had been hypothesized. Other writers have concentrated on the importance of background characteristics and perceived judicial roles and have de-emphasized institutions and procedures of courts.[3]

In order to provide comparative information on the formal decision-making procedures of state high courts, a questionnaire was sent to the chief justices of each of the fifty state supreme courts during the summer of 1973. By the use of follow-up letters and published sources, data were obtained for forty-nine of the fifty states.[4]

The questionnaire covered four basic decision-making procedures: (1) the use of oral arguments, (2) the order of conference discussion, (3) the order of voting, and (4) the assignment of written opinions.

Oral arguments

The use of oral arguments as part of the initial decision-making process varies from state to state. Of the forty-three states responding to this section of the questionnaire, twenty-five reported that 90 per cent or more of their cases are accompanied by oral argument of counsel.[5] Only six of the responding states hear oral argument in fewer than 50 per cent of cases.[6] Kentucky hears oral argument in only 2 per cent of cases, followed by Oklahoma with only 10 to 20 per cent. In Indiana, all civil cases are accompanied by oral arguments but criminal cases rarely are. In Utah, 66 per cent of the civil cases but only 10 per cent of the criminal cases are presented orally.

Oral argument is viewed differently by different justices.[7] It is questionable whether it has a marked impact on the outcome of cases. Wold reported that most of the justices he had interviewed in Maryland felt that their "original predispositions toward cases were occasionally altered because of the arguments given by counsel,"[8] but one of the justices indicated that oral arguments altered his position about 40 per cent of the time.

Procedure used during the decision-making conferences may be of considerable concern to students of the courts.

Some jurists consider the role of the oral argument crucial. Former U.S. Supreme Court Justice William O. Douglas has stated that the use of the oral argument may win or lose a case, for it is in the oral argument that justices question counsel and delve into the issues of the case for themselves. Justice Felix Frankfurter called the court "a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view to meeting them."[9] But even in the United States Supreme Court, oral arguments are not heard in all cases.

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[1] John T. Wold, *Internal Procedure, Role Perceptions and Judicial Behavior: A Study of Four State Courts of Last Resort* (unpublished Ph.D. dissertation, Johns Hopkins University, 1972), p. 23.

[2] *The Second Circuit: Federal Judicial Administration in Microcosm*, COLUMBIA LAW REVIEW, LXIII (May, 1963), 874–908.

[3] For a general review of this literature *see*: Stanford S. McConkie, *Environmental, Institutional, and Procedural Influence in Collegial Decision-making: A Comparative Analysis of State Supreme Courts* (unpublished Ph.D. Dissertation, Washington State University, 1974), chapter I.

[4] Though forty-nine states responded to the survey, the total NA for specific questions will vary due to the failure of some states to answer all aspects of the questionnaire.

[5] This does not include Louisiana, Nebraska, or Washington, states which simply replied that a majority or a large majority of their cases are accompanied by oral argument.

[6] This includes Utah, as described above.

[7] Walter F. Murphy, ELEMENTS OF JUDICIAL STRATEGY (Chicago: University of Chicago Press, 1964), p. 7.

[8] Wold, *Internal Procedure, Supra* n. 1, p. 56.

[9] Henry J. Abraham, THE JUDICIAL PROCESS (New York: Oxford University Press, 1975), p. 192.

On the other hand, some state supreme courts have essentially done away with oral argument. This strongly suggests that these courts do not see it as an essential part of the appellate process. One study has suggested that there is no relationship between the frequency of the use of oral arguments in judicial decision-making and the level of conflict experienced by the court,[10] but the empirical question of whether the oral argument better meets the demands of justice is left unanswered.

ment better meets the demands of justice is left unanswered.

Conference procedures

In most state high courts the decision of the court is made after hearing oral arguments during a conference of the justices. Most of the courts do hold decision-making conferences, but procedure varies widely from court to court. Some eleven different procedures have been identified.

Only four states, Georgia, Maine, Pennsylvania, and Ohio, follow the practice of the U.S. Supreme Court, where the chief justice speaks first followed by the other justices in order of seniority.[10] A more common approach—used in nine states—is to order the discussion in reverse seniority with the chief justice speaking last. Another nine states allow the reporting judge to speak first, followed by the other justices in order of seniority. Idaho and Massachusetts follow the same procedure but reserve the right of the chief justice to speak last. Alaska allows the reporting judge the first opportunity to speak, followed by the other justices in reverse order of seniority. Colorado and Mississippi do likewise, with the additional provision that the chief justice speaks last. Indiana follows a system of speaking in reverse order of seniority with the reporting judge last.

Eighteen of the forty-eight reporting states use some variation of random discussion. The most common order of these random conference discussions is no set order at all, an approach followed by eleven of the states. Illinois allows the reporting judge to speak first, but that is the extent of the order. Virginia, on the other hand, rotates among the justices in order of discussion, preserving the right of the reporting judge to have final say. In Nebraska, the judges discuss the case in alphabetical order. While fairly constant, the order changes with each change in personnel and ignores seniority and/or leadership of the members of the court. Iowa allows the reporting judge to speak first followed by the other justices counterclockwise around the conference table, thus altering the order of discussion with each case. New York has the reporting judge speak first followed by the remaining judges beginning with the justice that is next in seniority. Oklahoma allows the reporting judge to speak first followed by the others in rotation. The justice to the left of the reporting judge speaks first in Rhode Island; discussion then rotates around the conference table with the writer of the opinion speaking last.

Louisiana rarely holds formal conference discussions and does not hold a conference after the oral argument. Rather, the judge who has been assigned the case simply writes an opinion for the court. The justice immediately junior to the opinion writer acts as a second and reviews the cases assigned to him in order to comply with a constitutional requirement that two justices review each case.

The procedure used during the decision-making conferences may be of considerable concern to students of the courts; it is during this conference that most courts reach their final decision or at least outline the direction the opinion is going to take. Order is perceived to be an important factor in this conference. In terms of small group theory, it is felt that the individual who has the first opportunity to speak has the greatest degree of influence over the decision,[11] since here the direction of the discussion and the points at issue are defined. It would appear that formal conference procedures which assign specific responsibilities to individual justices are designed to increase unity. On

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[10] McConkie, *Environmental, supra* n. 3, p. 166.

[11] Glendon Schubert, JUDICIAL POLICY-MAKING (Glenview, Illinois: Scott, Foresman and Co., 1964), p. 101.

State Supreme Court Decision-Making Procedures

	Oral argument (% of cases heard)	Order of conference discussion	Order of voting	Assignment of opinion
Alabama	NA	NA	NA	NA
Alaska	100	Reporting judge, then reverse of seniority	Reporting judge, then reverse of seniority	Reporting judge if in majority
Arizona	100	Reverse of seniority chief justice last	No set order	Chief justice assigns
Arkansas	30	Reporting judge, then by seniority	Reporting judge, then by seniority	Reporting judge if in majority
California	99	No set order	No set order	Chief justice assigns
Colorado	100	Reporting judge, then reverse seniority, chief justice last	Reverse of seniority chief justice last	Chief justice assigns
Connecticut	100	Reverse of seniority, chief justice last	Reverse of seniority, chief justice last	Chief justice assigns
Delaware	100	No set order	No set order	Chief justice assigns
Florida	80	Reporting judge, then by seniority	Reporting judge, then by seniority	Reporting judge if in majority
Georgia	NA	Chief justice, then by seniority	No set order	Reporting judge
Hawaii	100	No set order	No set order	Chief justice if in majority, senior judge if not
Idaho	90	Reporting judge, then by seniority, chief justice last	Reverse of seniority, chief justice last	Reporting judge if in majority
Illinois	75–80	Reporting judge, then random	Reverse of seniority	Rotating basis
Indiana	10–20	Reverse of seniority, reporting judge last	Reverse of seniority, reporting judge last	Reporting judge if in majority
Iowa	85	Reporting judge, then counterclockwise	Reporting judge, then clockwise around table	Rotating basis
Kansas	77	Reporting judge, then by seniority	Reverse of seniority, chief justice last	Rotating basis
Kentucky	2	No set order	No set order	Reporting judge if in majority
Louisiana	Lg. maj.	No formal conference	No formal vote	Random
Maine	100	Chief justice, then by seniority	Chief justice, then by seniority	Rotating basis
Maryland	NA	Reverse of seniority, chief justice last	Reverse of seniority, chief justice last	Chief justice in all cases
Massachusetts	NA	Reverse of seniority, chief justice last	Reverse of seniority, chief justice last	Chief justice assigns
Michigan	95	Rely on commission reports, few conferences	NA	Rotating basis

Minnesota	100	Reporting judge, then by seniority	Usually no formal vote	Rotating basis
Mississippi	100	Reporting judge, reverse seniority, chief justice last	Reporting judge, rev. seniority, chief justice last	Reporting judge if in majority
Missouri	50	No set order	Reverse of seniority, chief justice last	Rotating basis
Montana	100	Reverse seniority, chief justice last (usually)	Reverse seniority, chief justice last (usually)	Chief justice assigns
Nebraska	Most	Alphabetical	Alphabetical	Chief justice assigns
Nevada	95	Reporting judge, then by seniority	No set order	Rotating basis if in majority
New Hampshire	90	Reporting judge, then by seniority	No set order	Reporting judge drafts opinion before conference
New Jersey	99	Reporting judge, then by seniority	Chief justice first, then seniority	Reporting judge if in majority
New Mexico	90	Reverse of seniority, chief justice last	Reverse of seniority, chief justice last	Chief justice assigns
New York	85+	Reporting judge, then next senior, etc.	Reporting judge, then next senior	Reporting judge if in maj., if not, dissenting judge
North Carolina	90	No set order	Reverse seniority, chief justice last	Rotating basis if judge in majority
North Dakota	100	No set order	No set order	Rotating basis
Ohio	90–95	Chief justice, then by seniority	Reverse seniority, chief justice last	By lot among those voting in majority
Oklahoma	10	Reporting judge, then rotation	Reporting judge, then rotation	Chief justice assigns
Oregon	99	No set order	No set order	Chief justice assigns
Pennsylvania	85–90	Chief justice, then by seniority	Reverse seniority, chief justice last	Chief justice assigns
Rhode Island	NA	Left of rep. judge, reporting judge last	NA	Random basis prior to oral argument
South Carolina	80	Reporting judge, then by seniority	Reporting judge, then by seniority	Rotating basis
South Dakota	100	No set order	No set order	Rotating basis
Tennessee	NA	NA	NA	NA
Texas	100	Reverse seniority, chief justice last	Around table, chief justice last	Rotating basis
Utah	67 civil 10 crim.	No set order	No set order	Rotating basis
Vermont	99	Reverse seniority, chief justice last	Reverse seniority, chief justice last	Rotating basis
Virginia	NA	Rotating with reporting judge last	Usually no formal vote taken	By lot
Washington	Maj.	Reverse seniority, chief justice last	No set order	Reporting judge if maj., if not, chief
West Virginia	75	Reverse seniority, chief justice last	Reverse seniority, chief justice last	Rotating basis
Wisconsin	100	Reporting judge, then by seniority.	Reporting judge, then by seniority.	Rep. judge if maj. if not, dissenting opinion
Wyoming	95	Rotation	Rotation	Chief justice assigns

the other hand, states that have no set order in the conference process may encourage conflict by allowing each of the justices to go his separate way.

Formally established conference procedures may have some impact on the outcome of a case, but historically-oriented studies of the U.S. Supreme Court seem to indicate that the role of leadership assumed by the chief justice may be the dominant influence in conference decision-making.[12] Perhaps a more important factor to examine would be the role either formally given to or informally adopted by the chief justice.

Voting

Like the U.S. Supreme Court, seventeen state courts of last resort vote more or less in reverse seniority, with the chief justice voting last. Mississippi has the reporting judge vote first followed by the remaining justices in reverse of seniority, retaining for the chief justice the final vote. Illinois votes in reverse order of seniority, as does Indiana, except that Indiana allows the reporting judge to cast the final ballot.

In Maine and New Jersey, the chief justice votes first, followed by the remaining justices in order of seniority, while in Arkansas, Florida, South Carolina, and Wisconsin the reporting judge votes first followed by the remaining justices in order of seniority. Three more states, Iowa, Oklahoma, and New York, allow the reporting judge to cast the initial vote followed by either a random or rotation voting procedure. Nebraska follows the same procedure used in conference discussion; the judges vote in alphabetical order.

Seventeen of the responding states have no set order of voting. Many of these reach agreement outside of a formal conference procedure. Two, Minnesota and Virginia, usually take no formal vote. Louisiana does not hold a formal vote, but the justices come to conference and circulate their written opinions around the conference table for the other justices to sign if they concur. When the required number of signatures is obtained, the opinion is accepted. If the circulated opinion is not signed by a majority of the justices, a conference discussion may take place.

Do differences in procedure affect the substance of court decisions?

It has been suggested that voting procedure may give individual justices (particularly the chief justice) unique opportunity to influence the decision made by collegial bodies.[13] If this is indeed the case, the procedure used becomes important. From a traditional standpoint, unity has been an important judicial goal. Canon 19 of the Code of Judicial Ethics carried an anti-conflict attitude for the judicial process for many years. The current revision of this ethic has excluded this anti-conflict provision. Empirical evidence available to date shows no relationships between the methods of voting used by a court and the level of conflict experienced.[14]

Assigning written opinions

The method of opinion assignment may play a critical role in the nature of the court's final decision. As is the case in the U.S. Supreme Court, in fifteen (32 per cent) of the states included in this study the chief justice plays an important role. Murphy has noted a number of ways in which the chief justice can use his authority to assign opinions to further his goals.[15] By selecting a moderate justice, he can encourage consensus. By selecting a wavering justice whom he hopes to sway, he may be able to capture the minority. Further, the assignment of an opinion may be used as a reward for his coalition on the court or a penalty for members of the court he would like to weaken or force out.

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[12] Abraham, THE JUDICIAL PROCESS, pp. 195–217.

[13] David J. Danelski, *The Influence of the Chief Justice in the Decisional Process*, in THE FEDERAL JUDICIAL SYSTEM, ed. by Thomas P. Jahnige and Sheldon Goldman (New York: Holt Rinehart, and Winston, Inc., 1968), pp. 147–160. *See also*, Murphy, ELEMENTS, pp. 82–100.

[14] McConkie, *Environmental*, *supra* n. 3, p. 166.

[15] Murphy, ELEMENTS OF JUDICIAL STRATEGY, p. 48.

Of the fifteen states using some system of opinion assignment that involves the chief justice, only Hawaii follows the pattern of the U.S. Supreme Court by allowing the chief justice the authority to assign the opinions in all cases in which he is in the majority, and the senior associate justice the authority to assign opinions in all cases in which the chief justice finds himself in a minority. In the remaining states of this group, the chief justice assigns opinions in all cases regardless of his position. But even here the power of the chief justice is not necessarily unlimited. On the Wyoming court, for example, the chief justice assigns the opinions but does so on a rotating basis. The California court has a system whereby the chief justice assigns the opinions, but this is done prior to conference discussion, and the opinion is reassigned only if the justice to whom it was previously assigned to finds himself in the minority.

In thirteen states, the opinion is assigned to the reporting justice if he is in the majority; if not, the chief justice or senior associate in the majority has the task of opinion assignment. In twenty courts the assignment is made on some type of rotating basis. In less than half of these states the assignment is valid only if the justice to whom the case would normally go is in the majority. In Indiana, for example, the reporting justice writes the opinion unless outvoted, in which case the first dissenting opinion writer becomes the majority writer.

Some states use procedure that occasionally causes the unique problem of having the writer of the majority opinion also write of a dissenting opinion.[16] This happens when opinions are assigned on a rigidly rotating basis regardless of the justices' position in conference.

In Louisiana, New Hampshire, Rhode Island, North Dakota, South Dakota, and Virginia, the opinion is assigned prior to oral arguments or conference discussion. In New Hampshire and Louisiana, the opinion is written prior to the conference in which the final decision is reached. In North Dakota, cases are assigned to the justices by the clerk of the court on a rotating basis prior to the beginning of the term. Rhode Island, South Dakota, and Virginia assign the task of writing opinions in specific cases prior to oral arguments and conference discussion. In these states the assignment may be changed in unusual cases.

Conclusions

A review of the decision-making procedures of state supreme courts reveals the single most notable factor to be the wide diversity of their operations. No two state courts of last resort appear to follow a common pattern in arriving at decisions. Do these differences in procedures affect the substance of court decisions or the ability of the court to fulfill adequately its constitutional and statutory functions?

At the present time, the answer appears to be no. There seems to be no reason to conclude that the different procedures of the various state high courts have any significant impact on the nature of their opinions. While uniformity of judicial pronouncements is a desirable goal, uniformity of operation may not be. Indeed, the ability of a given court to adapt to the special circumstances of its environment may be more important than the benefits derived from the adoption of a uniform set of judicial procedures. ☐

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[16] Three examples of this are: State v. McCorvey 428 P 2d 762 (1967), in which Justice Fatzer of the Kansas Supreme Court writes both the majority and a dissenting opinion; Ralls v. Caliendo 422 P 2d 862, (1967) in which Justice Fatzer writes the majority opinion and concurs in part and dissents in part in a lone second opinion; and finally Williams v. City of Gallup 421 P 2d 804 (1966), in which Justice Wood of the New Mexico Supreme Court wrote the majority opinion and concurred in Justice Nobel's dissenting opinion.

A modest remedy for judicial activism

GARY L. McDOWELL

THE issue of judicial activism is hardly new to American politics. Every Court since *Chisholm v. Georgia* (1793)—the case which led to the Eleventh Amendment—has found itself immersed in the animating political issues of its age. While there is a strong tendency in American political thinking to view the judiciary as an institution "exterior to the state" and removed from the "sweaty crowd" and rancid stuff of everyday political life, the fact of the matter is that, by the nature of its business, the federal judiciary is preeminently a political institution.

Because the judiciary is a political institution, it has frequently been the object of political wrath. Thomas Jefferson complained of Chief Justice John Marshall that in his hands the Constitution was "nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice"; Abraham Lincoln argued that Chief Justice Roger Taney, in his opinion in the case of *Dred Scott*, had done "obvious violence" to the "plain unmistakable language" of the Declaration of Independence; during the Progressive era, Senator Robert M. LaFollette characterized all federal judges as "petty tyrants and arrogant despots"; and President Eisenhower is reported to have concluded that his appointment of Earl Warren as Chief Justice of the Supreme

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Court was "the biggest damn fool mistake" he made during his presidency. There is a problem, however, in recognizing the Court's political position. That very recognition often serves only to blur the important line between proper and improper exercises of judicial power. Too often the debate over judicial activism and judicial restraint is dismissed as empty and spawned by rather superficial considerations of whose political "ox" is gored. This is a mistake. For judicial power *can* be abused, and when it is, it is important to articulate how and why, and, most importantly, what should be done about it.

Limiting jurisdiction is inappropriate

The past few years have seen an ever-increasing outpouring of Congressional proposals to curb the courts. Most of the proposals differ little in form or substance from those which have been a fairly regular feature of each Congress since the early controversial decisions of the Warren Court. In general, the proposals are aimed at single issues such as school desegregation, abortion, and prayer in public schools. They are, for the most part, attempts to curtail the jurisdiction of the federal courts in particular areas. Thus we find bills on abortion, bills on school prayer, bills on busing to achieve desegregation, and so forth. It is at best a piecemeal approach to a problem that demands a more thorough solution.

Present Congressional efforts to deal with judicial activism are troubling in two ways. First, they fail to reach to the heart of the matter. The real problem is not the exercise of judicial power in a particular case (*Roe v. Wade*, permitting abortions, for example) but the exercise of judicial power more broadly considered. By addressing judicial activism on the level of particular decisions, Congress is treating symptoms at the expense of curing causes. The most important issue is not how *Roe v. Wade* was decided but how the matter became a cause of action in the first place.

The second troubling aspect of recent court-curbing efforts is deeper yet. These efforts imply that the authority of the Court is not binding, that its decisions can be lightly dismissed or ignored. A case in point is the issue of school prayer. One of the proposals would remove federal court jurisdiction—at both the lower and the Supreme Court levels—to entertain such suits. But the plan would leave standing as good law the controlling Supreme Court decision banning prayer in public schools (*Engel v. Vitale*). The effect would be to say that although the decisions remain there will be no way to enforce them. As Kenneth Kay has pointed out, this is nothing more than allowing Congress to give the states a "knowing wink and say 'go ahead—they can't touch you now.'" In the end, such an arrangement would serve only to undermine the stature of the judiciary in American politics and respect for the rule of law. However much one might think that the Court has exceeded its legitimate authority in deciding certain issues such as school prayer, one should not be so rash in attempting to remedy the situation so as to lose the all-important veneration for the institution. For "Governments [illegible] general," Tocqueville noted, "have only two methods of overcoming the resistance of the governed: their own physical force and the moral force supplied to them by the decisions of courts."

The fundamental defect of most of the pending proposals is that they are imprudent. They are *insufficient* in that they fail to treat the causes of judicial activism at a level deep enough to make a permanent difference, and they are *excessive* in that they go so far as to seriously impair the proper functioning of the judiciary within the American political order. A more modest and ultimately more efficacious approach is to address the issue at the level of cause and to restructure the judicial process in such a way as to confine it to those issues with which it is best equipped to deal. The most successful remedy for judicial activism will be a *procedural* remedy.

The movement toward abstraction

Controlling the Court through putting back up some of the procedural fences is an idea amply supported by both American legal theory and experience—it makes sense in principle and it works in practice. From Felix Frankfurter to Joseph Story to James Kent—indeed, all the way back to Alexander Hamilton—it has been recognized that proper legal procedures are necessary to a proper exercise of judicial power. In his famous defense of the judiciary in *The Federalist* Hamilton summed it up this way:

> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.

By turning its attention away from the more politically dramatic proposals for jurisdictional exceptions and focusing on the more mundane business of procedures and practices, Congress can direct its energies where they will be most successful. Through tightening up the judicial process Congress can effect a legitimate and safe restraint on the exercise of judicial power. For the current spate of judicial intrusiveness is the result of loose procedural arrangements that have allowed, even encouraged, a movement of judicial activity from deciding concrete cases to pondering abstract principles, and from clearly defined particular controversies that admit of *judicial decision* to considerations of broad policy questions that admit more of *political deliberation.*

There has been a steady movement from the concrete to the abstract in four areas of judicial procedure. In the area of *standing* there has been a movement from the traditional demand for a concrete legal interest toward the more abstract standards of "zones of interest" and "injury in fact." In the area of *class actions* there has been a shift from the standard of a clearly defined class with a strictly defined common legal interest toward more loosely defined classes presenting more abstract claims. In the area of *declaratory relief* the movement has been away from concrete standards of what constitutes a case or a controversy (an economic claim, for example) for the purposes of judicial resolution to more abstract standards (a violation of equal protection by a malapportioned legislative district). And in the area of *equitable relief* there has been a drastic movement away from a rather narrow understanding of equity jurisdiction as a proper means of vindicating concrete property rights (generally dealing with accidents, mistakes, frauds, and trusts) to a more amorphous understanding that equity jurisdiction is somehow competent to vindicate more abstract rights such as equality. In each instance Congress has the power —and, one could argue, the political responsibility—to return the Court to a more concrete exercise of its powers. I will consider each set of procedures separately.

Standing

In the area of standing to sue (a concept which Professor Paul Freund has labeled "among the most amorphous in the entire domain of public law") the Court endeavors to determine if a particular plaintiff has a sufficient interest in the case to warrant judicial intrusion. The Court asks if the plaintiff is a sufficiently adverse party with a vested legal interest in the outcome of a case or controversy that can be finally resolved by the courts. The doctrine of standing is an effort to distinguish a threshold procedural requirement from the actual merits, or substantive issues, of the case. The debate over whether such a distinction is possible need not detain us here. The important point is that the Court in fact *assumes* such a distinction can be made and has attempted to articulate standards to evaluate claims of standing. It is in those standards that looseness and ambiguity have developed.

Just how much the doctrine of standing has changed can be seen by comparing two cases. In the first, *Cherokee Nation v. Georgia* (1831), Justice Thompson argued that it is "only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings that courts of justice can interpose relief." In *Muskrat v. United States* (1911) the Court affirmed that "the judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." The same point, the demand for a clear legal interest susceptible of final judicial resolution, was made by Justice Frankfurter when he insisted that if no "common law right exists and no . . . constitutional or statutory interest has been created, relief is not available judicially."

The notion that there *had* to be a legal interest to establish standing has faded. In its place has come the more liberal (judicially speaking) standard of an "injury in fact." By this standard a previously existing legal right is not requisite for standing; a provable injury to *any* interest is sufficient. The dominant sentiment is that, in the absence of any Congressional exceptions to this new doctrine, the standard is merely, in Kenneth Culp Davis's words, "a judicial judgment as to whether the interest asserted is, in the circumstances, deserving of judicial protection." As a result, the Court has abandoned the sense of restraint that the legal interest standard demanded and willingly grants standing for interests that go far beyond what the old legal interest standard would ever have permitted.

This trend is seen most clearly in *United States v. SCRAP* (1973), in which a group of law students claimed they suffered an injury because of certain railroad surcharges permitted under an Interstate Commerce Commission order. They alleged that as a result of the surcharge they "'suffered economic, recreational, and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure,' that each of its members was caused to pay more for finished products, that each of its members uses the forests, rivers, mountains, and other natural resources of the area . . . and that these uses have been adversely affected by increased freight rates."

The Court was impressed. Justice Stewart agreed that the effect of the allowed rates would result in the depletion of natural resources and, among other problems, increased litter in the national parks in the area to such an extent as to constitute a "specific and perceptible harm" to the members of SCRAP, a group whose interests, to the Court's way of thinking, were sufficiently distinct from the interests of the public at large to meet the threshold requirement for standing. Such a "specific and perceptible harm" as increased litter was indeed an "injury in fact" and enough to give SCRAP standing to sue. Thus, under the new standards of standing, a public interest group claiming what is at best an abstract injury—aesthetic damage to the environment—can press its policy views under the guise of a lawsuit and influence the course of public policy through judicial resolution.

As Justice Powell would endeavor to remind his brethren in *United States v. Richardson* (1974), the "relaxation of standing requirements is directly related to the expansion of judicial power." But the expansion has been accompanied by a transformation of judicial power as well, for the loose standards for standing have allowed the exercise of judicial power to move from the "determination of cases and controversies to explicit judicial guardianship of the public interest."

Judicial history makes clear that if there is to be a meaningful and stable standard for standing it will have to come from outside the Court itself. Constitutionally, under the grant of power by the Necessary and Proper Clause, Congress has the authority to impose minimum standards for what constitutes a case or controversy having access to the judicial process. The Constitution granted Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Through statute, Congress can give greater and more stable definition to the threshold standard of standing. Having exercised such a power in the Administrative Procedures Act (1966), Congress can legitimately replace the loose "injury in fact" standard with a version of the more concrete "legal interest" standard.

Class actions

The legal device of a class action greatly emphasizes the "legislative" quality of the judicial process. Its purpose is judicial efficiency, to bring together separate parties with a common claim where "one or more sue or defend for the benefit of the whole." The point is to reduce multiple litigation, thus conserving judicial time and effort. Its effect is to present the Court with an opportunity to render judgments affecting whole classes of people. It is important, then, that what constitutes a class be carefully and clearly defined.

Through various reforms, the class action suit has become one of the most common devices by which the judiciary imposes its politics on the country. And, with a loosening of the standards of what constitutes a class, the result has been that the individual adverse litigant has faded a bit into the background. Broad decrees fashioned for broadly defined classes of people (for example, a particular race or gender) are in essence judicially created social policies.

In the beginning, the class action suit demanded that the class be clearly defined and the claim be concrete as well as common. Before the promulgation of the Rules of Civil Procedure in 1938, class action suits were guided by a strict *community of interest* (or joint rights) doctrine. That is, all members of the class had to stand in the *same* relationship to the opposing party and raise the *same* claim. For example, a well defined class with a community of interest would be all those who purchased an Oldsmobile only to discover that each automobile had been outfitted with a Chevrolet engine. Each individual claim is identical; each plaintiff stands in the same relationship to the defendant. By bringing all the plaintiffs together, an obvious multiplicity of suits can be avoided. Such a situation was the original object of the class action suit.

With the rise of legal realism, however, the concrete standard of a community of interest came to be viewed as hopelessly out of phase with the new more pragmatic, more empirical jurisprudence of the times. The Rules of Civil Procedure of 1938 loosened this strict community of interest standard so as to include suits where there are "several rights" and a "common question of law or fact affecting the several rights," in addition to suits involving the traditional "joint rights." As the *Harvard Law Review* reported in its survey of the development of class actions, this distinction between *joint* and *several* rights in the 1938 rules was "a source of confusion almost from its date of promulgation." The result was that in 1966 the original 1938 class action rule was amended, as the Supreme Court interpreted it, in order to replace "the old categories with a functional approach to class action."

Under this new "functional approach," Justice Fortas had occasion to explain, "the focus shifts from the abstract character of the right asserted to the explicit analysis of the suitability of the particular claim to the resolution in class action." What this actually means is that the concrete standard of a strict community of interest has been abandoned in favor of the more abstract standard of simply a "matter in controversy." The individual adverse litigants are not as important to sustaining the action as are the broader policy implications of the issue. The *Harvard Law Review* explained the rationale this way:

> First, to the extent that they open courts to claims not ordinarily litigated, class actions enable courts to expose policies underlying causes of action in circumstances where those policies might not otherwise be effectuated. Second, to the extent that they enable the courts to see the full implications of recognizing rights and remedies, class action procedures assist the courts in judging precisely what outcomes of litigation would best serve the policies underlying causes of action.

As in other procedural areas, and as is amply supported by both the original 1938 rule and its 1966 amendment, Congress has the legitimate authority to restructure the practices and procedures governing the class action suit in the federal courts. A return to the older, concrete standard of a strict community of interest and a movement away from the abstract functional approach is the place to begin. Further, by ending the present practice of allowing a class action suit to continue even after the named plaintiff's claim has been satisfied, Congress could guide the Court back to its primary purpose—the resolution of cases or controversies between particular adverse litigants—and away from what is, by any other name, social policy making. By establishing that mere race or gender or ethnic group is insufficient to satisfy a community of interest requirement, Congress can pull the judiciary out of the sociological mire and back on the firmer ground of protecting the rights of individuals.

Declaratory relief

A declaratory judgment is, in Henry Abraham's words, a "device that enables courts generally to enter a final judgment between litigants, *in an actual controversy*, defining their respective rights under a statute, contract, will, or other document, *without* attaching to the otherwise binding judgment any consequential or coercive relief." Declaratory relief, then, is a judgment *before* the intricacies of an actual lawsuit start up. Perhaps not surprisingly, the procedure has been available only since 1934. In 1933 the Supreme Court hinted that such a procedure would, despite a 1928 Supreme Court opinion to the contrary, probably fit comfortably within the limits of the "case or controversy" requirement of Article III of the Constitution; in 1934, taking the hint to heart and wishing to make Court procedures more efficient, Congress passed the Declaratory Judgment Act; in 1937, true to its word, the Court upheld the Act. Writing for the Court, Chief Justice Stone held that "the operation of the Declaratory Judgment is procedural only" and conforms to the Constitution by still demanding an actual adversary dispute between real parties which is "manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present rights upon established facts."

The problem is that, despite the Court's confidence, the act has proved to be more than "procedural only," and such judgments do appear to fade into advisory opinions. In conjunction with the other procedural developments in areas of standing, class actions, and equitable relief, the Declaratory Judgment Act has led to the creation of new causes of action, and, as David Dickson has written, "changed both the substantive rights of parties and the jurisdiction of courts." (*Roe v. Wade*, the abortion case, was an action for declaratory relief.) The result of the Act has been to blur the boundaries of what constitutes an actual case or controversy.

One of the traditional standards for a case or controversy is the notion of "ripeness"; that is, the dispute must be neither hypothetical nor dead nor moot. The ripe controversy is one that is both clear and present; only then, it is agreed, can a court competently reach a *judgment* on the merits of the case, because only then will the legal issues be clearly exposed. By allowing a resolution of the conflict by declaratory judgment at an early stage of the dispute, before any concrete motions have begun to secure the claim in court, the Act serves to denigrate the idea of ripeness as a meaningful standard of a "case or controversy."

There is an additional threshold problem. By attempting to declare certain rights prior to the complete adversary process—a process including discovery, the underlying logic of which is to draw out all the facts and issues possible—a declaratory judgment is often based on arguments other than those that emanate from the facts of the case at hand. Hence, judgments are often declared more in accordance with the social and political predilections of the Court than in accordance with the established facts of the case. (In one case an ordinance banning obscene films was upheld *before* the details of the film in question were revealed.) Not unlike the new class action, the declaratory judgment is too often based more on the broader implications of the substantive policy issue than with the particular legal claims of the parties. Bolstered by the new, looser class action requirements, and the nearly non-existent standards for proving standing to sue, the Declaratory Judgment Act has greatly facilitated the rise of public interest litigation by private parties. The declaratory judgment has become a device whereby the Court may, in effect, convert political issues into legal ones.

The declaratory judgment has also proved to be much more than a simple declaration. Such a declaration implies enforcement because, as Chief Justice Marshall put it in *Marbury v. Madison*, where there is a right there must be a remedy. Thus, the declaratory judgment has come to be closely tied to equitable relief. Once the rights have been declared, the logic of the legal process demands more (as, for example, the reapportionment cases show). In the area of legislative districting, beginning with *Baker v. Carr* (1964), the Supreme Court "departed from the judicial task of applying the Constitution to invalidate existing districts, and assumed the political task of legislating new districts." The results, as Professor Dickson reports, were tragically predictable:

> In the reapportionment cases the Supreme Court, once embarked on requiring district court supervision of redistricting, was driven by the inexorable limits of judicial competence to simplify the issue to "one man, one vote" in all situations, regardless of interference with a coordinate branch of the government, the amount of litigation provoked, competing considerations, and the will of a majority of the people involved. The Court has felt compelled to give orders to a state legislature regarding the bills it might pass, and to strike down variations of less than four percent because the legislative solution departed from "the mathematical ideal."

This tendency of a judicial idea to expand itself to the limits of its logic (as Benjamin Cardozo put it) is hardly limited to the reapportionment area. It has characterized the areas of school desegregation, low-income housing, and the reform of prisons and mental health facilities. The result is that judges now find themselves administering social services on a more or less daily basis with more or less disastrous results.

Experience under the Declaratory Judgment Act suggests that it is time for Congress to reexamine the premises of the Act and to take a close look at how the Act has contributed to a much more politically active judiciary. Through statutory reform a good bit can be done to restrict the use of the declaratory judgment to those occasions when its use is demanded only by considerations of judicial efficiency.

Equitable relief

When the Rules of Civil Procedure of 1938 merged actions in law with actions in equity into one unified civil procedure, a traditional view that equity is a potentially dangerous source of unfettered judicial discretion was ignored.[1] Since Aristotle first articulated the idea of juridicial equity, and through its development in the later jurisprudential works of Coke, Hobbes, Blackstone, and Story, it was a generally accepted maxim that while equity was essential to any sound system of law, it was necessary that it be hemmed in by principles and bound down by precedent lest it degenerate into arbitrary discretion.

In the American Constitution, the judicial power was created so as to extend to all cases in law and equity. The failure of the Constitution to distinguish procedurally the two great spheres of law and equity did not go unnoticed. Keen-eyed Anti-Federalist critics of the Constitution such as *Brutus* and the *Federal Farmer*, wary of all the particulars of the Constitution anyway, immediately jumped on the problem posed by the blurred jurisdiction between law and equity. This power in equity, warned *Brutus*, would allow the judges to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter," thereby granting them the power to "mould the government into almost any shape they please."

The *Federal Farmer* was equally shrewd in his appraisal of the judiciary. In his view, his countrymen were "more in danger of sowing the seeds of arbitrary government in this department than in any other." The lack of precision in defining the limits of equity in the Constitution was a serious defect which would contribute to "an arbitrary power of discretion in the judges to decide as their conscience, their opinions, their caprice, or their politics might dictate." For if a judge should find that the "law restrain him, he is only to step into his shoes of equity, and give whatever judgment his reason or opinion may dictate."

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[1] This section draws from my *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy* (Chicago: The University of Chicago Press, 1982). I am also generally indebted to William Kristol, *The American Judicial Power and the American Regime* (doctoral dissertation in political science, Harvard University, 1979).

To defend the power of federal juridical equity against the Anti-Federalist attack, Alexander Hamilton, in *The Federalist*, insisted that the power was both essential and severely limited. The purpose of the power, he said, was to provide relief to those who suffered the consequences of "hard bargains." Such hard bargains were those dealings between individuals that might, for whatever reason, involve the elements of "*fraud, accident, trust*, or *hardship*." In general, Hamilton argued, "the great and primary use of a court of equity is to give relief in *extraordinary cases*, which are *exceptions* to general rules."

In the Judiciary Act of 1789 and the subsequent Process Act, Congress (whose key committees contained some of the leading Anti-Federalist doubters) struck a balance between those who advocated a hard separation between law and equity and those who wished equity to be an unfettered judicial tool in every federal court. While the acts extended equity to all federal courts, they simultaneously established a rigid procedural separation between the two actions. The draftsmen of these bills saw the procedural distinction as necessary if equity was to be kept from becoming a dangerous source of unfettered judicial discretion.

By combining the procedures of law with procedures in equity, the Rules of 1938 in effect ignored the dangers which had always been at the core of the procedural arrangements of equity. The Rules of Civil Procedure of 1938 made it convenient for judges to switch from their shoes of law to their shoes of equity whenever they found the law too restrictive. In its effort to reduce equity to a safe and more certain code, the Rules opened the door for the power of equity to be exercised with a disregard for precedent or procedure.

In *Porter v. Warner* (1946), the Court seemed on the verge of giving equity a radical expansion by arguing that when the "public interest is involved in a proceeding" the equitable powers of the federal district courts "assume an even broader and more flexible character than when only a private controversy is at stake." But it was not until 1955 that it became clear just how fluid equity had become. The Court, in the second *Brown v. Board of Education of Topeka, Kansas* case, fashioned a new understanding of the Court's equitable remedial powers. The central thrust was that in place of an individual adverse litigant the Court placed an aggrieved social class. Its remedies would no longer be decreed for the individual who had been injured by the generality of the law, but rather for whole classes of people on the basis of a deprivation of rights—a deprivation that was provable only by resort to the uncertain turf of psychological knowledge and sociological inference. Further, the Court went beyond decreeing discriminatory laws unconstitutional and restricting their operation and attempted to fashion broad remedies for those so deprived.

What is particularly striking about Warren's invocation of the federal equity power in *Brown* (II) is that while he spoke of the "traditional attributes" and guiding "principles" of equity being controlling, he then ignored most of the more substantial equitable principles in writing his decree. The effect was to present the lower federal courts with a virtual blank check for restructuring American political and social institutions.

Since *Brown*, the Court has continued to expand and to confuse the public perception of its power of equity. The result has been to replace precedent and principle as the standards of both constitutional meaning and equitable relief with social science speculation. This new tradition of sociological equity has baffled even its defenders who have sought to define its scope. Chief Justice Burger thus was driven to conclude in *Swann v. Charlotte-Mecklenburg County Board of Education* (1971) (the school busing case) that "words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature and limitations without frustrating the appropriate scope of equity." The problem, of course, is that words are all we have. One must at least suspect that if the limits of any governmental power cannot be clearly and forcefully articulated, then there is something desperately wrong with our understanding of that power.

With this "triumph of equity," as Abram Chayes describes it, it is no wonder that the city of Parma, Ohio, now finds itself obligated by the desegregation decree of Judge Frank Battisti to advertise in minority publications in order to recruit more minorities to move within its borders. Nor is it surprising that the city of Boston, despite being fiscally strapped, is being pushed by decrees from Judge Arthur Garrity into abandoning its earlier budget cuts because it seems to Judge Garrity that such belt-tightening measures as increasing youth transit fares and charging youth groups for their use of public park facilities constitute "a very serious impeding of the court's desegregation orders." Through their equitable remedial powers the federal courts have come to exert ever greater control over the public till. (One should at least pause to reflect on the promise by the Federalists that the judiciary would be the institution least dangerous to the political rights of the Constitution because it would neither wield the sword nor control the purse strings of the polity.)

If the Court cannot speak with confidence about the limits of the equity powers, it is the responsibility of Congress to do so. It is clearly within the constitutional prerogatives of Congress to sort out and give some definition and hence limitation to the equitable powers of the federal courts. Political deference to judicial self-restraint may indeed be a sound policy--as long as the judiciary can articulate some meaningful standards for the exercise of its powers. When it cannot, or will not, then it is time for the Congress to assume its constitutional obligations. That is what separation of powers is all about.

Congress can address the equity problem in a variety of ways. It could again separate the procedures in equity from the procedures in law. While this may be awkward and cumbersome, it would at least serve to remind the Court as well as the country that such procedural devices are frequently necessary to maintain the substantive integrity of a regime based upon the principle of the rule of law. Congress could also begin to refuse to grant equity jurisdiction as a part of many pieces of legislation. (The Fair Housing Act, for example, empowers the judiciary to enforce its provisions by injunctive relief.) There can also be a jurisdictional amount that sets a minimum of damages ($10,000, for example) before a federal court can exercise its equity jurisdiction. Congress could also place an *upper* jurisdictional limit on the amount of funds that can be ordered spent to fulfill an equitable decree. A limit, say, of $10,000 would certainly put something of a dent in most busing proposals. Or, more drastically, Congress can exempt certain cases from equitable relief, as it did with labor disputes in the Norris-LaGuardia Act. Whatever the tactic, the point is that in the area of equitable relief, as in the other procedural areas, Congress can do a good many things to return the judiciary to a more constitutionally faithful exercise of its intended powers.

A proscriptive or prescriptive judiciary?

In order to move in this direction, however, it is essential that we first sharpen our view of the problem of judicial activism by ridding ourselves of the apothegm that the Constitution is only what the judges say it is, that its words are "empty vessels into which nearly anything can be poured." We need to recover the older view that the Constitution has a meaning deeper and more permanent than the fluctuating opinions of the judges. In this light the Constitution is understood to embrace a theory of politics that serves as a standard against which the exercise of all powers of the government may be measured.

At the heart of the Constitution's theory of politics lies a fundamental truth about popular government: All power–judicial as well as legislative and executive–is of an encroaching nature. Left to themselves, all political men will go as far as they can in pursuit of their view of the political good, and the judiciary is subject to error of judgment no less than the other branches of the government. The judges were no more expected to be that "philosophical race of kings wished for by Plato" than any other officer. While the Framers of the Constitution suffered no delusion that the judiciary was in any way an apolitical institution, they were convinced that by institutional arrangements judges could be rendered less subject to the immediate and transient political pressures in the community and hence less partisan in their judgments. That the judges might on occasion presume to substitute their will for that of the people or of the legislature was not a possibility the Framers dismissed. Indeed, they sought to construct the judicial power within such an institutional context that the politically indispensable judicial functions could be safely and fairly administered and any judicial excesses could be trimmed.

The question of judicial activism must be addressed within the context of the doctrine of separation of powers. The idea of separating the powers of government in the Constitution had two objectives: to prevent tyranny by avoiding the unhealthy concentration of power in any one department, and to promote efficiency in the administration of the powers necessary to any government. Within this context the judiciary was to serve as a buffer against those ill humours that occasionally grip the population and can be translated into law. The judicial power was understood to be a necessary guard for the rights of individuals and minorities against the crushing political weight of what James Madison called "an interested and overbearing majority." Yet the judiciary was only one of several *auxiliary* precautions designed to check the inevitable tendency in popular governments toward legislative tyranny. In spite of all the contrivances, the regime was still considered to be, first and foremost, popular if not simply democratic. All of the institutional devices were meant to direct and tame popular opinion, not block it. The hope was that through institutional filters a *qual-*

itative rather than merely a *quantitative* majority will would come to be expressed as law.

Constitutionally, the judiciary is, as Alexander Hamilton claimed in *The Federalist*, the branch "least dangerous to the political rights of the Constitution." But it is only the *least* dangerous (notice Hamilton did not foolishly suggest that it was simply not dangerous) if it exercises its legitimate function—judgment. Admittedly, the line between the exercise of the will and the exercise of the judgment is at best a blurred one. But what Hamilton had in mind is unambiguous. The function of the Court was to patrol the constitutional boundaries of the other branches (the legislature especially) and of the states and to keep them within their prescribed limits. The purpose of an independent judiciary was to insure that the limited and supreme Constitution remained so. As another leading Founder, James Wilson, put it, the courts were intended to be "noble guards" of the Constitution. Thus, the essence of the judicial power was originally understood to be *proscriptive*. Should the Court endeavor to take any "active resolution" it would be engaging in an illegitimate activity. Instead of being proscriptive and marking out the limits of the Constitution, the Court would be behaving in a *prescriptive* way and redefining the limits of the Constitution. Instead of being a bulwark of a limited Constitution, it would become the vanguard of an unlimited one.

Despite the dangers of legislative power, it was still considered by the Framers to be the cardinal principle of popular government. Basic to this principle is the belief that it is legitimate for the people through the instrumentality of law to adjust, check, or enhance certain institutions of the government whenever it is deemed necessary and proper. This includes the power of the legislature to exert some control over the structure and administration of the executive and judicial branches.

The qualified power of the legislature to tamper with the judiciary is not as grave a danger to the balance of the Constitution as the friends of judicial activism in every age attempt to make it. The Framers were not blind to the problem of making the judiciary too dependent upon "popularity." Even when a judicial decision runs counter to particular—and perhaps pervasive—political interests, the institutional arrangements of the Constitution are such as to slow down the popular outrage and give the people time for "more cool and sedate reflection." And given the distance between the people and legislation that such devices as representation (with its multiplicity of interests), bicameralism, and the executive veto afford, an immediate backlash to judicial behavior is unlikely. Experience demonstrates that any backlash at all is likely to be weak and ineffectual. But if the negative response is not merely transient but is widely and deeply felt, then the Constitution wisely provides well-defined mechanisms for a *deliberate* political reaction to what the people hold to be intolerable judicial excesses.

Principled limits to adjudication

If the history of court-curbing efforts in America teaches anything it is this: The American political system operates to the advantage of the judiciary. Presidential court-packing schemes are notoriously ineffective as a means of exerting political influence over the courts. Impeachment is properly too difficult to use as an everyday check against unpopular decisions. Not since John Marshall saw fit to defend his opinion in *McCulloch v. Maryland* (1819) in the public press has any justice or judge felt obliged to respond to public outrage over a decision. And it is very difficult—usually impossible—to build a coalition sturdy enough to pass court-curbing legislation.

Political responses to what are perceived to be excesses of judicial power take one of two forms. The response will either be a *policy* response (against a particular decision or line of decisions) or an *institutional* response (against the structure and powers of the courts). In either event, the response may either be *partisan* or *principled*. Usually a policy response will take the form of a constitutional amendment or a piece of legislation designed to overrule a decision. An institutional response will generally make an effort to make jurisdictional exceptions, to create special courts with specific jurisdiction, or to make adjustments regarding the personnel, policies, and procedures of the judicial branch.

Whatever the response, court-curbing is difficult for two reasons. First, no matter how badly a particular decision or line of decisions may gore your "ox," that same decision will undoubtedly have benefited a clientele at least as large and politically vociferous. While a majority in one of the houses of Congress may object to particular cases of "judicial impertinence" (as Representative Wilson viewed Justice Davis's controversial opinion in *Ex Parte Milligan* (1867)) there will certainly be a variety of objections that will issue in different views of what should be done. James Madison's "multiplicity of interest" theory works as well. The second reason court-curbing is not an easy business is that there is an underlying appreciation in American political thought for a properly independent judiciary. There seems to be a general consensus that tampering with judicial independence is a serious matter and the consequences of rash reprisals against the court as an institution may upset the original constitutional balance that has worked so well for so long. Underlying the occasional outbursts of angry public sentiment against the Court is that "moral force" of the community of which Tocqueville spoke. On the whole, the American people continue to view the judiciary as the "boast of the Constitution."

To be successful, any political attempt to adjust or limit the judicial power must be—and must be perceived to be—a principled rather than a merely partisan response. Only then will the issue of judicial activism be met on a ground high enough to transcend the more common—and generally fruitless—debates over judicial liberalism and judicial conservatism. The deepest issue is not whether a particular decision or even a particular court is too liberal for some and too conservative for others; the point is whether the courts are exercising their powers capably and legitimately. Together, the standards of *institutional capacity* and *constitutional legitimacy* are far more helpful in thinking about the nature and extent of judicial power than the ideological stamps of liberal and conservative. Keeping the courts constitutionally legitimate and institutionally capable benefits both the liberal and conservative elements in American politics.

Since the Constitution only creates judicial *power*, it is left to the more representative institutions to fashion the judicial *process*. In truth, the federal courts "live and move and have their being through the legislation of Congress." In the final analysis, judicial activism is not so much a case of judicial usurpation as it is of Congressional abdication. In light of this, Congress would do well to recover a bit of wisdom offered over half a century ago by Felix Frankfurter and James Landis: "The happy relation of States to Nation—constituting as it does our central political problem—is to no small extent dependent upon the wisdom with which the scope and limits of the federal courts are determined." Our current state of judicial activism is largely the result of Congress failing to exercise such wisdom.

Employment and Crime: An Issue of Race

Samuel L. Myers, Jr.

The call for greater community involvement in crime control and crime prevention has come at a time when alternatives to traditional criminal justice system strategies have failed. Evaluations of in-prison training programs, vocational programs, educational programs, work release programs, job assistance programs, supported work programs, and even outright cash subsidy programs seem to support the view that (1) nothing works or, at best, (2) that nothing works as well as the good old medicine of "Lock 'em up, keep 'em there."

Many of the alternatives to the traditional use of the police, courts, and prisons in fighting crime have sought to deal with the economic problems that offenders or ex-offenders face. In order for community-based, grass-roots, and self-help strategies for crime prevention or crime control to work, though, it is important that their planners understand how economic institutions and the criminal justice system interact.

This essay is intended to advance our understanding of the interaction of employment and crime. At the outset, however, it is useful to convey an essential concern motivating our analysis. Frequently researchers have blamed the failure of labor markets to keep people employed or the criminal justice system to keep people out of crime on what are called distortions. Distortions or more specifically market distortions are often unrelated or external interferences that impede the ability of the system to operate efficiently. Racism or racial discrimination is one such distortion. Racism in the labor market results in workers through time being denied access to certain job opportunities—a denial that forecloses even the possibility of subsequent economic mobility. It can be a subtle form of enslavement. Racism in criminal justice systems results in some alleged offenders being incarcerated and psychologically brutalized, virtually guaranteeing their continued entrapment in the criminal world and the criminal justice system. It can be a stark form of enslavement.

It happens that the distortions of racial discrimination and racism not only cause inefficiency, but they cause gross inequity. Some writers have argued that this is not so unusual at all.[1] It might be contended that the system achieves a balance, given a certain level of desired inequity, through gains or payoffs elsewhere. For example, some

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black people will always make it "big" in crime by progressing out of street crime into white-collar crime. Some black people will make it big through legitimate employment, perhaps to the ranks of corporate management. The balance comes because of dualism in the crime and legitimate worlds. White-collar crimes are defined, litigated, and punished differently than street crimes. But in fact they are the same. Corporate managerial jobs are more differentiated from the lowest occupational categories by the people who hold them than by the tasks that are performed. But there is room for a few token blacks who ordinarily would be relegated to the bottom. Such is the balancing act.

This description suggests two possible lines of inquiry. On the one hand, it could be argued that the apparent equilibrium of racially unequal outcomes in both the labor market and the criminal justice system is purposeful. It is rooted in a conscious, systematic design. It has its historical legacy in slavery and other racist institutions that have only changed over the years in their outward appearance.

On the other hand, it could be argued that the distortion of racism or racial discrimination, however evolved, creates the central link between labor markets and crime. Racial discrimination in labor markets results in lower incomes to blacks, so they turn to crime. Because of discriminatory treatment by police, blacks are more likely to be accused of crimes of theft or crimes against property; so they are arrested, go to jail, serve long sentences, and withdraw from the labor market. With criminal records and little work experience, ex-offenders, who are disproportionately black, cannot find employment.

These two perspectives are neither mutually exclusive nor collectively exhaustive.[2] But the latter is persuasive enough alone to propel the discussion that follows. First, we summarize the empirical evidence on the relationship between employment and crime. Then we outline in detail the way racial discrimination links together outcomes in the labor market and in the criminal justice system and we suggest why numerous manpower programs for ex-offenders have failed. In a penultimate section some new empirical evidence is offered in support of the perspective advances.[3]

EVIDENCE ON CRIME AND EMPLOYMENT

There is a broad literature on the economics of crime. Both radical and orthodox writers have rationalized a relationship between crime and employment. Either the segmented structure of the labor market inhibits upward mobility in legitimate pursuits, thereby enticing entry into crime, or crime, like work, is but a byproduct of rational decision making. These similar theoretical perspectives, reviewed in Myers (1978), have been advanced independently of conflicting empirical evidence.

Many studies have discovered a relationship between crime and employment. However, a glaring deficiency of the time series and cross-section analyses of unemployment rates and crime rates by Brenner (1976), Fleischer (1966), and Glaser and Rice

(1959) lies in the aggregate nature of the studies. Nonetheless, in these reports, strong, although contradictory, evidence is found linking crime to aggregate levels of unemployment.

Gillispie (1975) provides a thorough review of virtually all of the early studies on crime and income. He also concludes that the aggregate data are at best suggestive of a link between economic variables and crime but without revealing how that link might be formed. More recently, Witte (1979), examining micro data sets in addition to the volumes of studies using aggregate data, shows greater skepticism. She thinks that there probably is no direct connection between unemployment and crime. She suggests that extreme caution should be exercised in drawing conclusions from evidence showing a significant relationship between employment and crime.

If there is some doubt about a general relationship between employment and crime, there is little doubt that there are specific interactions that involve both labor markets and the criminal justice system. Miller (1978) has estimated that nearly one-quarter of the labor force have criminal records. The existence of a criminal record has been shown to restrict the type of occupation one can enter (Portney, 1970), to increase the chances of dismissal from a job one already holds (Leonard, 1967), and generally increase the likelihood that one will be unemployed (Leiberg, 1978). The employment prospects of ex-offenders are bleak. Pownall (1971) reveals that released offenders have higher turnover rates, higher unemployment rates, and lower wages than the general population.

There also seems to be specific discernible effects of poor employment opportunities on participation in crime. Philip Cook (1975), in an analysis of a sample of Massachusetts parolees, concludes that improved job opportunities reduce the probability that an ex-offender will recidivate. Robert Taggart (1972) and others have cited findings that suggest that participation in illegal activity is linked to failure in the job market.

The difficulty with these findings, it is conceded, is that the populations being examined are disproportionately black and disadvantaged. Are their unfavorable outcomes due to their specific disadvantage of being ex-offenders or to their general disadvantage of being poor and black? Is race merely an intervening variable here, or is it the central factor linking performance in the labor market with outcomes in the criminal justice system?

RACE, CRIME, AND UNEMPLOYMENT

There is substantial statistical support for the contention that blacks are overrepresented in the criminal justice system. In 1975, for example, of the 1.8 million arrests for serious crimes reported in the United States, nearly one-third were arrests of black men and women. More than half of those under 18 years old who were arrested for violent crimes were black youths. (National Criminal Justice Information and Statistics Service, 1978).

Because blacks are more likely to be convicted and then receive longer prison terms, their overrepresentation is even greater in the prisons. While they account for 11% of the total U.S. population, blacks represent 47% of the total prison population (National Prison Statistics Special Reports, 1979). Some contend that these facts arise because of the greater propensity of blacks to engage in crime. Others assert that there is a greater propensity of blacks to be *labeled* criminal, while in fact they are not.[4] These facts have fueled an ongoing debate about the crime rate differentials for blacks and whites. More important, though, these facts correlate almost amazingly with racial disparities in employment.

Repeatedly, labor market studies reveal that relative to white workers blacks receive lower wages, are disproportionately represented in menial occupations, have higher turnover rates, and consistently have higher unemployment rates.

The following simple model illuminates how race, crime, and employment may interact.[5] Assume that there are exactly two income-earning prospects facing potential criminals—work and crime—and that total income is the sum of legal and illegal earnings. Illegal and legal earnings, of course, depend upon the rates of return, or wages, to crime and legitimate activities.

Now suppose that a person chooses the amount of time to spend in crime and work so as to maximize expected income. Then it can be shown that the optimal allocation of time to crime depends upon the relative attractiveness of crime and work. This simple, abstract model yields an intuitive result that could have been obtained through a more realistic vehicle. Implicit is the assumption that we are all rational, self-interested, individualistic, calculating beings. Despite this obvious lack of realism, the model goes further.

Suppose that blacks and whites are identical in every respect save that blacks are less likely to be hired, receive lower wages, and, therefore, expect lower wages than whites because they are discriminated against in the labor market. Given these assumptions, relative returns to crime for blacks are greater than that for whites. Hence, rational, self-interested, individualistic, calculating blacks should spend more time in crime, because it pays!

Now it is easy to see how a color-blind criminal justice system interacting with a racially imbalanced labor market can lead to very unequal outcomes for blacks and whites. Within the context of this same model, however, it is possible to visualize unequal outcomes for blacks and whites when the labor market is perfectly balanced and the criminal justice system is fair and unbiased.

Suppose, once incarcerated, blacks are less likely to be released, not because they are black, but because they have in abundance characteristics that the statisticians have discovered are intimately linked to crime. Thus, blacks will serve longer prison sentences, and all other things being equal, prisons will be disproportionately black.

When they are released, blacks and whites with the same job experiences and employment histories will be paid the same wages and be offered equivalent jobs. This is fair and just; it derives from the assumption that the labor market is perfect—that there are no distortions, imbalances, or ugly imperfections such as "racial discrimination." Yet for the very reason that blacks serve longer sentences than whites, they will receive lower average wages upon release from prison than whites, because they have accumulated less work experience and are less valuable to rational employers. Since the returns to work will be lower for blacks, their relative returns to crime will be higher and thus they should rationally allocate more time to crime, because crime pays!

So what we see in the model now is an apparent absence of racism or racial discrimination of any sort. But the outcomes are very unequal. The apparent absence of racism in the model of course does not wish it away. Why are blacks overly endowed with characteristics that are statistically related to criminality? Because of a historical legacy that denied access to political and economic mobility for their ancestors? Because the laws have been defined—explicitly during Jim Crow Years, implicitly thereafter—to make what they do punishable by imprisonment while what the Kennedys and Rockefellers do is rewarded by elected office? The answer one provides is independent of the consequential result: race is the major factor linking labor market success to criminal justice system outcomes.

The assertion that crime and employment are linked together via the ubiquitous phenomenon of racism astonishes some, is puzzling to many. But upon reflection the relation is not so obscure at all. If one examines the thousands of jobs that are beyond the reach of ex-offenders because of state and federal licensing restrictions, one is amazed that a significant public outcry for changing these laws was not heard prior to the early seventies. Yet as these restrictions topple, the numbers of unemployed ex-offenders remains virtually unchanged. Why? Few ex-offenders, who we have previously argued are disproportionately black, qualify for these licensed jobs, criminal record or not. Moreover, white-collar criminals, even your disbarred attorneys and expelled congressmen, manage to live in a style supported by the rules of the game they themselves wrote. Would prostitution be illegal if streetwalkers wrote the laws?

But more concretely, it can be established that the duality of the criminal justice system evolved in tandem with the duality of the labor market. Historians of penal reform, notably Thorsten Sellin, provide ample documentation. It might be recalled that the constitutional amendment that eliminated slavery also assured the continued use of involuntary servitude in the criminal justice system. This left the door open for the continued slavery of blacks. After abolition of slavery there was a strong need for a pool of cheap labor. Some freed slaves refused to work for their former masters. Some did not work. Most, converging on the cities, could find no paid work. "Vagrancy" often resulted. And this, you need not be reminded, was a crime.

Imprisonment rates for blacks more than doubled after the Civil War. Incarcerated blacks particularly in the South were often placed in convict camps, hired out to their former slave masters, and then inhumanly beaten and brutalized if they did not settle back into the slave-like routine. This sort of forced labor became so well institutionalized that many states required that the prison systems become self-sufficient. Even well into the twentieth centry, when convict-lease systems were replaced by service to state-run "chain gangs," blacks' employment in prison mirrored their pre-Civil War conditions. They had the lowest-paying, dirtiest, most menial jobs available. In prison and out of prison the heritage of slavery had been preserved.

As difficult as it is to believe, a scenario of the prison system and, indeed, the entire criminal justice system as a powerful political and economic force emerges. Both the dual system of justice and the dual economic system have been transformed into modern-day versions of their pre-Civil War institutions. The racial underpinnings of these modern dual systems are still there. The outward manifestations of slavery, of course, have been eliminated.

PROGRAM FAILURES

Most programmatic efforts based on even the most loosely constructed conceptualization of an interaction between employment and crime have focused on the ex-offender. There are exceptions, of course. Crime prevention strategies like those based on the community anticrime model admit a peripheral relationship between local job opportunities and crimes of theft and vandalism. Summer job programs for youth, for example, reduce the idleness of a large crime-prone group and thereby reduce crime. Yet evaluation of the effectiveness of such measures is elusive. How many crimes would have been committed in the absence of the program? Can we adequately control for all of the other intervening variables—for example, the effect of hot weather on crime or the effect of being out of the hot weather and in an air-conditioned workplace—and still isolate the independent influence that work has on crime?

Both because the population is targeted and easily identified through official sources and because "treatment" effects can be more rigorously examined, ex-offenders and in particular ex-prisoners have often been the subjects of programs and experiments designed to reduce crime through improved employment. Four types of programs have been explored thoroughly: employment and vocational training, job-search assistance, cash subsidies, and supported work. All have similar failings.

The logic behind training for ex-offenders and for current or recently released prisoners is straightforward. These individuals have little education, spotty previous employment experiences, and few marketable job skills. In other words, they have what economists call low endowments of human capital. Enhancing the human capital of offenders is the task of training programs. If these potential workers can be given a skill, it is thought, they will find better jobs and thereby will find work more attractive as a livelihood than crime. Thus, they do not return to crime. As reasonable as this perspective may sound, however, reviews of the many offender employment and training programs implemented during the 1960s reveal that few of them work. Correctly, one Abt Associate's (1971) report concludes that it is not so much that the programs did not work. It is just that on the basis of poor evaluation, poor design, and/or poor implementation it is often impossible to ascertain what effect, if any, training has on reducing recidivism. A case in point is an evaluation of federal community treatment centers (CTC) conducted by the U.S. Bureau of Prisons (1978). One group of federal prisoners was released on parole and another group was released to community treatment centers. At the CTCs, ex-offenders received a wide variety of employment and vocational training and counseling. The paroled group received no treatment. Although the groups were "matched" in the sense that both would have been eligible for release to community treatment centers, there remained significant differences in the groups. Nonetheless, it was found that the CTC group had lower rearrest rates than the comparison group.

Upon closer examination one will discover that the findings are based upon small fractions of the original samples. There is an extraordinary amount of attrition. And this attrition seems to differ systematically between the "treatment" group and the comparison group. Until the statistical results can be adjusted for this apparent selection bias, any conclusions drawn should be viewed with extreme caution.

The rationale for job-search assistance is that the problem of recently released ex-offenders is one of not knowing where the available jobs are. Although many states have employment referral services, the consensus seems to be that these sources represent only a minor fraction of all matches between jobs and applicants in the labor market. Counselors who are attuned to the needs and special problems of offenders, it is argued, can be more effective in securing jobs for their clients than the impersonal bureaucratic mechanisms that have even evolved in local Comprehensive Employment and Training Act (CETA) programs. The results of all of the job assistance experiments have not been succinctly evaluated. But if the experience of the Baltimore LIFE (Living Insurance for Exprisoners) is in any way illustrative, then they do not fare better than training programs.

In a sample of 432 hardcore, repeat property offenders, one-quarter received job-search assistance, one-quarter received a cash subsidy equivalent to unemployment compensation, and one-quarter received neither cash nor assistance. A last group received a combination of cash and job assistance. The post-prison rearrest rate for the job assistance group was insignificantly different from the control group which received nothing, so Mallar and Thornton (1978) find.

Cash subsidies flowing from a distinctly different notion of the real problems faced by ex-offenders have had a more promising record. Kenneth Lenihan (1974) has carefully studied the problems faced by recently released prisoners. He believes that along with the social pathological problems of readjustment to old friends, neighborhoods, and family, there is the acute problem of low financial resources. Ex-prisoners just do not have savings or a cash cushion upon release from prison in order to adequately bridge the gap between the two worlds of prison and work. The Baltimore LIFE project mentioned above was designed in part to bridge the gap. By providing a cash subsidy for a number of weeks after release from prison, the ex-offender would have sufficient time to readjust to the outside world, time to look on his own for the kind of job that he can feel comfortable in, time to think, and time to settle down. Indeed, Mallar and

Thornton (1978) find that this sort of unemployment insurance has a strong and significant impact on reducing post-prison recidivism. However, Rossi et al. (1980), in an effort to replicate the Baltimore project in Texas and Georgia, do not observe this encouraging finding. They cite problems of administrative differences in disbursing the subsidies and differences in the composition of the samples. But their most important finding is one that is the key to a reasoned criticism of all of these programs for ex-offenders and a clue to why those programs "fail."

Rossi et al. argue that there is a strong work disincentive effect operative. Unemployment insurance discourages work. Work is inversely related to crime. Hence, unemployment insurance increases crime rather than reduces it. [illegible] the objective of this and many other well-intentioned programs was to reduce recidivism, not to increase employability. Often the outcomes, particularly in the vast majority of criminal justice funded programs, are measured in terms of "success" or "failure" where these concepts are typically unrelated to the notions of adjustments, personality change, improved self-worth, or other well-documented sociopsychological correlates of satisfactory transition from the world of prison to the world of work.

A more recent experiment builds on past mistakes. The supported work model assumes that the adjustment from the world of prison to work requires a strategically phased reentry program. There is a need for encouragement and positive feedback. There is a need for support from one's peers—those who have been through it all themselves. Piliavin and Gartner (1980) report on some of their preliminary findings on the post-prison outcomes of individuals participating in this sort of work environment with peer support. The evidence is disappointing. Despite severe problems of attrition and sample-selection bias, these programs do not appear to work. Recidivism rates are not lower for program participants. Employment rates appear not to be dramatically affected.

It should not be concluded that these or other programs could not work. For example, cash subsidies to employers for hiring ex offenders or subsidies to supplement the wages of ex-offenders could possibly bypass the work disincentive effects cited in the review of that program failure. But it should be remembered that none of the programs of labor market intervention was designed or implemented with a careful conceptualization of the role that racism and racial discrimination play in distorting both the labor market and the criminal justice system. Without a better theoretical concept of how race, crime, and employment are intertwined, future programs and experiments may suffer similar fates as those discussed here.

NEW EVIDENCE

The discovery of the role that racism plays in forging a link between labor markets and the criminal justice system justifies a closer reexamination of previous studies. Many writers and researchers have observed that there are significant racial differences in both recidivism and in post-prison employment. Undoubtedly, these differences

TABLE 1
Actual and Predicted Probabilities of Pre-Prison Employment, Imprisonment, and Parole

	Actual Probility		Predicted Probability	
	Black	White	Black	White
Pre-Prison Employment[a]	.11	.13	.07	.07
Imprisonment[b]	.05	.04	.00	.01
Parole[c]	.36	.50	.32	.50

SOURCE: U.S. Board of Parole

[a] Dependent variable in logit model is probability of having been employed prior to incarceration more than four years. Independent variables are age, I.Q., sex, education, marital status, drug or alcohol usage, previous confinement in mental hospital.

[b] Dependent variable in logit model is ratio of previous commitments to prison to previous convictions. Independent variables are age, I.Q., sex, education, marital status, drug or alcohol usage, previous confinement in mental hospital.

[c] Dependent variable in logit model is probability of release on parole. Independent variables are age, I.Q., sex, education, marital status, drug or alcohol usage, previous confinement in mental hospital, number of parole hearings, prison punishment, theft conviction, "white-collar" conviction.

could be accounted for by factors correlated with race. Or these differences could be accounted for by diverging demographic profiles between blacks and whites. In either case, one must be extremely cautious in blaming racism for the unequal outcomes.

For example, young people have lower earnings and higher unemployment regardless of their race. They are also more likely to be arrested because in their early years of adulthood they may be more active in visible street crimes. If the age distribution of the black population is skewed toward the younger ages relative to the white population, the higher crime rates and lower employment rates among blacks could be accounted for by their youthfulness alone. There are numerous statistical techniques for controlling for such possibilities. These techniques are well known and are widely used in a large body of literature on racial discrimination.

In the course of engaging in such orthodox exercises, I uncovered some interesting new evidence. The evidence illuminates the complex interaction between institutionalized forms of racism and the institutions of the labor market and the criminal justice system.[6]

Peter Hoffman and Barbara Meierhoefer (1979) have reported on an excellent data set of the postrelease arrest experiences of federal prisoners. For six years after their release from prison in 1970, nearly 2,000 ex-felons were traced using the FBI's "rap sheet" records. Hoffman and Meierhoefer have graciously lent this author the data set.

A number of factors have been found to be significant in determining post-prison rearrest probabilities. These include a measure of pre-prison employment experiences, a measure of the certainty of punishment, and a measure of treatment by the criminal justice system. It is found that blacks are more likely to be rearrested than whites. But if rearrest depends on employment opportunities, the higher crime rates among blacks could be accounted for by their differing pre-prison employment experiences. If rearrest depends on the certainty of punishment—that is, the risks of engaging in crime—then rearrest disparities between blacks and whites could be attributable to their differing perceived risks or responses to these risks. Finally, if rearrest depends on how one is treated within the system or similarly how one gets out of the system, the gap between black and white recidivism could be explained by unequal treatment.

In Table 1, pre-prison employment experience is captured by the probability that one was employed for more than four years prior to the most recent incarceration. The average for blacks is 11% and for whites 13%. Black ex-felons are less likely to have had any significant stretch of stable employment than whites. Clearly though, these differences could arise because of such differences in background characteristics as age or education. Unlikely as it may seem, if blacks in the sample were highly educated, at very early ages blacks would display low values of the employment experience variable because they would not have been in the labor force long enough to have accumulated this experience after leaving school. Of course, what one would like to do is to control for these influencing factors to capture the *ceteris paribus* rates of pre-prison employment for blacks and whites. Indeed when a logit regression technique—discussed in Henry Theil (1971)—is employed to control for age, I.Q., sex, education, marital status, drug or alcohol usage, and previous confinement in a mental hospital, the average pre-prison employment probability converges for blacks and whites. The regression equation predicts that 7% of the blacks would have worked on one job for more than four years before prison; it predicts that 7% of the whites would have too.

Again in Table 1, risk of punishment is measured by the ratio of the number of previous prison commitments to the number of previous convictions. It is the probability that one goes to prison given a conviction. It is not exactly the "probability of getting caught" variable that many researchers have in mind when they think of the risk of engaging in crime. In fact, this measure is positively related to recidivism: past failures are more likely to become failures again. Nonetheless, we observe that 5% of black convictions result in incarceration while 4% of whites who are convicted go to jail or prison. This low ratio for both races is due principally to the fact that one can be convicted for any number of crimes but typically only receives one prison commitment in a given trial. Once in prison, however, the offender may serve many concurrent or consecutive sentences. So an alternative interpretation of these diverging ratios is that blacks get sent to prison on the basis of fewer convictions than whites.

A *ceteris paribus* calculation is valid here also. Controlling for the same background characteristics as in our previous example, we compute the risk of punishment for blacks to be 0% and for whites just 1%. Because of rounding this finding obscures the fact that the predicted probabilities in fact converge to the same low value of less than one commitment out of 100 convictions for both blacks and whites.

A third variable of interest in Table 1 is release on parole. It measures the treatment within the system and the method out of the system. Being paroled often means being adjudged "rehabilitated" by correctional personnel. It means you've paid your dues to society. It means that less of your sentence will be served than the law can demand. It means freedom. Only 36% of the blacks found their way out of prison in this manner, compared to half of the whites.

But does the average figure tell the whole story? Are not offenders convicted of less serious crimes more likely to be paroled? Are not offenders who avoid mischief in prison more likely to be paroled? Calculating as we did before the predicted probability and controlling for both background characteristic and characteristics of the offense and prison adjustment, we find that blacks are still significantly less likely to be paroled. Even after controlling for the number of parole hearings, prison punishment, and type of offense for which the individual was convicted, whites are 1.5 times more likely to be released on parole than blacks. Differences in age, education, I.Q., sex, marital status, drug or alcohol usage, and history of mental hospital confinement cannot account for this disparity. Since we have controlled for any number of background variables and other factors related to the seriousness of the crime and to the adjustment of the prisoner while incarcerated, then federal parole boards must be looking at some other variable in making parole decisions for blacks and whites. Further analysis has shown that controlling for more observable characteristics of the offender and the offense does not diminish the gap much more. Maybe parole boards are using some unobservable index to make their decisions. This unobservable variable is not racially neutral. Or parole boards are using race itself as a screening device. Whichever hypothesis you subscribe to, it is difficult to conclude that parole board decisions result in racially unbiased outcomes.

What this exercise reveals is that while there are disparities between blacks and whites in the labor market and within the criminal justice system, all of these inequalities cannot be explained away by differences in innate or background characteristics of blacks and whites. Blacks have higher recidivism rates than whites. People released on parole have low[illegible]ecidivism rates. Blacks are less likely to be released on parole. It seems like a self-fulfilling prophecy. But why are blacks more likely to be in prison in the first place? Surely we have found that, controlling for background characteristics, the chances of having had a bad previous employment history are just the same as those of white inmates.

Here lies the key to the argument being made. Although they are very similar to one another in their pre-prison employment experiences and their risk of punishment, black and white prisoners compare to the general population in strikingly different ways. The white prisoner, while similar to the black prisoner in having little education, a spotty

TABLE 2
Post-Prison Hours Worked by Blacks and Whites

	Blacks (N=379)	Whites (N=53)
Actual average per week	24.39	26.86
Predicted using linear regression[a]	24.93	26.78
Predicted using white "criminal record" regression[b]	26.67	---
Predicted using white "employment history" regression[c]	26.66	---

SOURCE: Baltimore LIFE Sample

[a] Independent variables include treatment group, age, education, previous employment experience, job arranged upon release from prison, parole or discharge, last job was white-collar job, age when first arrested, family member ever in prison, time served for last offense, total times arrested, last arrest for property crime.

[b] Independent variables include treatment group, total times arrested, last arrest property crime, age, age when first arrested, family member ever in prison.

[c] Independent variables include treatment group, age, last job was white-collar job, education, previous employment experience.

work history, and a long involvement in crime, is very unlike the typical white worker. Black prisoners, however, are surprisingly similar to the general black labor force. This finding is true for state prisons and county jails as well as the federal correctional institutions. It is almost as if one could pick people at random from the black labor force and obtain a matching profile of the black prison population, while in order to get a good match for the white prison population the most downtrodden, depressed, and decrepit portions of the white labor force must be scanned.

In addition to comparing to the general population in very different ways, black and white prisoners—who are very similar to one another—are treated very differently within the system. The way out is decidedly different. Freedom from imprisonment, like freedom from involuntary servitude, comes about by way of diverging routes for blacks and whites.

What the federal prisoner data reveals is that racism in the criminal justice system seems to deny both the timely release of black workers from bondage and their ready return to the labor market. Future research will need to document the parallels of dualism in the job market and in the prisons. But for now, evidence exists that suggests that even after prison the gaps and disparities continue.[7]

Kenneth Lenihan and Louis Geneive who collected the Baltimore LIFE data provided me with a copy of the computer tape used by Mallar and Thornton. The average hours worked per week for the first 12 months after release from prison are computed and displayed in Table 2. Blacks worked less than 25 hours on average, while whites worked nearly 27 hours. At the then-prevailing minimum wage this differential implies a premium of about $250 per year. In fact, whites earned more per hour than blacks, so the annual premium is even larger.

Controlling for age, education, previous employment experience, age when first arrested, number of previous arrests, and a host of other variables, we predict virtually the same racial gap in postprison employment. The differing hours worked by black and white ex-offenders cannot be accounted for by differing pre-prison employment experiences, background characteristics, criminal history, or even parole history.

Skeptics will argue that the racial gap in hours worked merely mirrors the gap in crime rates. Blacks "choose" to engage in crime rather than to look for legitimate employment. Hence, on average they work fewer hours. Certainly criminal histories affect this decision. The more time we have invested previously in criminal pursuits the more profitable it will be to continue to engage in crime. But there is another effect of criminal history: a criminal record is a barrier to obtaining employment. Blacks may want to work more hours, but because of their extensive records are denied job opportunities. To test this hypothesis further, we estimated for whites an equation for hours worked that depended on criminal record variables. Then we inserted the black values of the independent variables into the estimated white equation. In other words, we posed this conjecture: Suppose the effect of criminal record on post-prison employment were the same for both black ex-offenders and white ex-offenders, would the gap between black and white employment narrow? The answer is yes. While the average hours worked for blacks is actually 24.9, the predicted value, using the white criminal-history equation, yields 26.7 hours per week.

The skeptics would not be satisfied. "Blacks may prefer crime because with their spotty previous work histories, legitimate opportunities just do not appear as attractive," they might argue. There is some sense to this argument, because indeed the work histories of black ex-offenders are very spotty. But do they really *prefer* to work less in favor of crime? Just as criminal records pose a barrier to blacks, so too may their previous employment history. We perform a similar test to see how many hours blacks would work if the effects of their previous employment histories on post-prison employment were the same as the observed effects for whites. First an hours-worked equation, which depends on pre-prison employment history, is estimated for whites. Then hours worked are predicted for blacks using this equation but inserting the actual values of the independent variables for blacks. Thus, we recognize that blacks and whites have different pre-prison employment histories; we are just interested in knowing if the impact of these histories on post-prison employment were the same, would blacks work more hours. The answer is yes. Whereas blacks worked not quite 25 hours on average, if treated like whites, even with their more spotty previous work records, they would have worked almost 27 hours.

These results demonstrate that the barriers of a criminal record and of scant pre-prison employment experiences affect black and white ex-offenders differently. These results suggest that racial discrimination, racism, or some racially nonneutral phenomenon is intervening in the interaction between crime and employment.

The examples we have presented here are just illustrative of the entirely different perspective that emerges when the issue of race is introduced into a reasoned discussion of labor markets and crime. By ignoring this perspective, we still observe intimate interactions between crime and employment. But the true sources of these interactions are obscured. Programmatic efforts based on an obscured view yield puzzling and often contradictory results as we have seen. It appears that the programs do not work. The programs are scrapped. Labor market aids are abandoned. This is a hefty price to pay, because the alternatives are all the traditional tried and true methods of crime control that can reinforce failure in employment and crime, further obscuring the role that racism plays in it all.

SUMMARY AND CONCLUSION

The role of racial discrimination or institutional racism in learned discussions on crime and employment has heretofore been ignored. We can only be suggestive in outlining possible theoretical and empirical relations between race on the one hand and employment and crime on the other. What appears clear, however, is that a satisfactory explanation of how these factors are intertwined must grapple with two parallel dualisms: the double standard of criminal justice, and racially segmented labor markets. This is a major task for future research.

In a purposefully cavalier manner we introduced a model of race, crime, and employment. In that model, blacks allocated more time to crime because crime pays. What one gets out of the model is roughly what we put into it. The image of blacks choosing to be criminals is at once absurd and provocative. It is absurd because all of the barriers, impediments, constraints, and other distortions in the real world can transform matters of rational choice to matters of necessity or even habit. No mention had been made of drugs. The absurdity is apparent when you think of a mellowed-out 500-gram-a-day heroin addict maximizing his expected utility, calculating the relative costs and benefits of a life in crime or a rewarding career in legitimate employ, and then preparing to pull up his sleeve to perfect these worldly calculations.

It is provocative, though, because it provides an empirical foundation for examining the role played by racism. If black ex-offenders do not work as many hours as white ex-offenders then it is either because they do not choose to do so, or they are not given the chance to do so. Without a theory of choice, however unrealistic, we would be forever grasping in a vacuum at a theory of chance.

We also summarized the well-known failings of manpower and subsidy programs to reduce crime. It would be foolish to continue to advocate expenditures of large sums for labor market intervention strategies to aid ex-offenders or to reduce crime if in fact these strategies do not or can not be expected to work. However, none of these programs were based upon even a foggy notion of the interface among racism and labor markets and the criminal justice system. A more careful look at previous employment and crime programs may reveal that when such an interface is acknowledged and incorporated into the overall strategy, that such programs prove to be more effective.

In spite of a large and growing literature on employment and crime, our ignorance of how labor markets and the criminal justice system interact is matched only by a perplexing unwillingness by scholars to acknowledge the role played by racism or racial discrimination in that interaction. If the question were purely an academic one, the losers would be the historians like David Rothman who have carefully documented the rise of the American way of punishment. But the question is a very policy laden one. Who will be around to document future failings? We may all be losers.

NOTES

1. Actually, the argument has been placed within a class-conflict perspective rather than one of racism or racial discrimination. See, for example, William J. Chambliss (1978) and Ivan Jankovic (1977).
2. For example, the former perspective is important in explaining the disproportionate representation of other minorities in the criminal justice system.
3. The discussion and illustrations in the following sections emphasize the plight of blacks in labor markets and in the criminal justice system. It ignores the plight of other minorities. This restriction is adopted purposefully. Data and empirical documentation on black employment and crime are readily available, in part because of the sizable number of unemployed and formerly incarcerated blacks. These data permit at best a preliminary examination of how labor markets and crime interest.
4. The outlines of these opposing views are discussed in Myers (1980b).
5. A formal development of the basic model is given in Myers (1980a).
6. This evidence is detailed in Myers (1981a).
7. This evidence is detailed in Myers (1981b).

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Law Enforcement and Civil Liberties:

WE CAN HAVE BOTH

MERIDEN
POLICE

A Special ACLU Report

By Loren Siegel

Crime and our faltering economy vie for first place among the pressing problems facing the American people today. Every day the news recites a new litany of hair-raising, violent crimes. The public perception of the rising volume of violent crime is even greater than the volume itself, and fear of crime has transformed many urban dwellers into recluses reluctant to leave the relative safety of their homes.

With the public justifiably demanding solutions, leaders on the national, state and local levels have resorted to tough-sounding rhetoric and various crime-fighting measures, including mandatory sentencing, restoration of the death penalty, pretrial detention and the repeal of the exclusionary rule. These measures strike at basic constitutional rights, such as the right to bail and the prohibition against unreasonable searches and seizures—rights written into the Constitution not to protect criminal defendants but to prevent government abuse of power. To make matters worse, as leading law enforcement officials point out, the new laws will not reduce crime.

The ACLU is opposed to "crime fighting" proposals that would expand governmental power at the expense of the rights of innocent people. Effective law enforcement and individual rights are not incompatible. With careful thought, rather than political expedience, we can have both.

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I. "QUICK FIX" SOLUTIONS

Pre-trial Detention

The presumption of innocence and the rights to due process of law, trial by jury and reasonable bail are fundamental rights guaranteed by the Fifth, Sixth and Eighth Amendments to the Constitution. It is a well-established constitutional principle that the freedom of an accused may not be restricted except to assure his presence at trial. The United States Supreme Court has said, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

Today, pre-trial detention bills have been passed by or are pending before many state legislatures. A bill which would have amended the Federal Bail Reform Act to permit assertedly dangerous defendants to be imprisoned before trial was passed by the U.S. Senate in September 1982, but civil libertarians managed against overwhelming odds to prevent its passage by the House.

The American Civil Liberties Union believes that not only is pre-trial detention unconstitutional, it will not do anything to stop violent crime. Studies show that few defendants commit crimes while on bail awaiting trial. According to one government study of about a dozen local jurisdictions, only 1.9 percent of all defendants released before trial are convicted of and imprisoned for serious crimes committed during that period of pre-trial liberty.[1] Can judges predict who that handful of defendants will be? The American Psychiatric Association has conducted extensive studies of the accuracy of predictions of future dangerous behavior and found that such predictions, whether made by psychiatrists or judges, are wrong about 95 percent of the time.[2] Since judges charged with the responsibility of protecting the community will be inclined to err on the side of over-predicting behavior that would not in fact occur, many innocent and harmless people will inevitably be imprisoned at great expense to the public.

The ACLU believes that speedy trials, guaranteed by the Sixth Amendment, are an effective and constitutional alternative to pre-trial detention. Several studies have shown that relatively few crimes are committed during the first sixty days of pre-trial release, but that the longer defendants are on release before trial, the more likely they are to be rearrested.[3] "If we could have trials in six weeks to two months," Federal Judge Harold Greene said in testimony before Congress, "the entire problem of crimes while on bail would disappear." Speedy trials will reduce pre-trial crime while protecting individual rights.

Repeal of the Exclusionary Rule

The exclusionary rule holds that anything seized or obtained in violation of the Fourth Amendment's prohibition against "unreasonable searches and seizures" may not be used as evidence in a criminal proceeding. The rule has become a favorite target of law and order rhetoricians who would have us believe it is a mere technicality which allows hordes of criminals to escape punishment. In fact, neither assertion is true. The exclusionary rule, the Supreme Court said in the case of *Mapp v. Ohio*, is not a technicality, but rather, "an essential part of both the Fourth and Fourteenth Amendments."

Every day thousands of law enforcement officials all over the country must stop and ask themselves whether they have sufficient evidence for a search warrant. Will their arrest stand up in court? Was a confession obtained without coercion? In his testimony before the Senate Judiciary Subcommittee on Criminal Law, Stephen Sachs, Attorney General of Maryland, observed, "Exclusion from evidence is almost certainly the only effective deterrent in the vast majority of unconstitutional intrusions."

Contrary to popular belief, the exclusionary rule does not release hordes of criminals to prey upon society. A recent study carried out by the Comptroller General of the United States shows that the rule rarely frees federal criminal suspects.[4] Of the 2,804 cases surveyed, only 0.4 percent were declined by federal prosecutors because of Fourth Amendment search and seizure problems. Evidence was excluded at trial in only 1.3 percent of the cases. And over 60 percent of the few defendants whose suppression motions were granted in

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whole or in part were nonetheless convicted. Another survey, by the National Institute of Justice, found that between 1976–79, 4.8 percent of all felony arrests in California were rejected for prosecution because of search and seizure problems.[5] Significantly, three-quarters of these felonies were drug related, not crimes of violence.

The exclusionary rule has not been significantly responsible for the freeing of guilty offenders. But it has been largely responsible for vastly upgrading the standards and performances of federal agents and local and state police throughout the country.

In spite of the exclusionary rule's overwhelming success, there are a number of measures afoot which would severely limit its implementation. One bill before the Senate would eliminate the rule outright and another would allow consideration of the extent of police misconduct in deciding whether the evidence could be used. The Reagan Administration favors legislation that would require federal courts to admit illegally seized evidence "if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment."

Lawrence Frank

This very question will be considered by the Supreme Court this term when it hears reargument in the case of *Illinois* v. *Gates*. Some members of the Court appear to be open to carving out a good faith exception to the exclusionary rule. Such an exception, whether by the Court or Congress, would be tantamount to a repeal of the rule since most judges will be unwilling to disbelieve a police officer's testimony.

The ACLU is not alone in opposing any weakening of the exclusionary rule. It is joined by other civil libertarians, the American Bar Association, legal scholars, and law enforcement officials.

"It is sometimes said that the exclusionary rule breeds disrespect for the law because it suppresses the truth and permits crime to go unpunished," Maryland Attorney General Sachs testified. "I believe that abolition of the rule would be far more destructive of respect for law."

"When an American court admits evidence obtained in violation of the Constitution it is not merely permitting the truth to be heard. It is inescapably condoning, validating, even welcoming, the illegality that produced it. It becomes part of that illegality. It paints a portrait of hypocrisy in a nation that professes to believe in the rule of law and whose courts, in the words of Madison, are to be the great 'bulwarks' and 'guardians' of our liberties."

Greater Use of Imprisonment

Sending more people to prison for a longer time is a national trend. During the 1970s the incarceration rate actually outstripped the crime rate. Many, including the federal Bureau of Justice Statistics, attribute the exploding prison population to a rash of new, stiff sentencing laws passed by state legislatures. In the past, trial judges retained wide discretion in imposing sentences. Now, all but twelve states have replaced discretionary sentencing with mandatory prison terms for many crimes.

One of the problems with mandatory sentencing laws is that they were passed without any regard for the country's prison capacity. As a result our prisons are dangerously overcrowded. A National Institute of Justice analysis calculates that as of 1978, about half of all state prison inmates were living in overcrowded cells. Today, approximately thirty states are operating their prisons under federal court order, and overcrowding is probably the major reason for court supervision.

The most common official response to this desperate situation is to build more prisons. While new prison construction might temporarily ease the situation, it is highly questionable whether it will have any long term effect on the crime problem or the problem of prison overcrowding. We already lock up twice as many people per capita as Canada, and four times as many as West Germany. In fact, only two industrialized countries lock up more people than we do: the Soviet Union and South Africa.

The assumption that imprisonment reduces crime, either through deterrence or removing criminals from circulation (known in corrections parlance as "incapacitation") has been challenged by research. Recent studies by the National Institute of Justice and the American Foundation's Institute of Corrections conclude that crime rates have no direct relationship to incarceration rates.[6] State prison populations seem to increase to fill new cell capacity regardless of factors such as crime rates or rates of conviction.

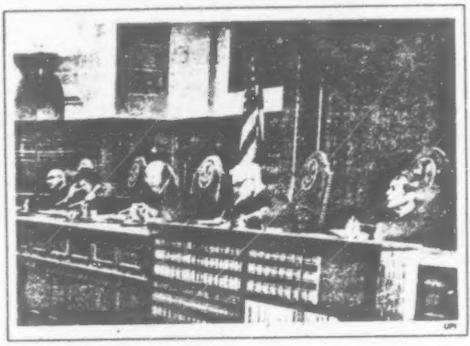
Finally, imprisonment is expensive. It costs an average of $70,000 per cell to build a maximum security prison up to constitutional standards, and expenditures for yearly operating costs run between $10,000 and $20,000 per cell. The money could be put to better use.

More prisons is not the answer. As the Correctional Association of New York, which has been observing and evaluating corrections policy in that state for more than a century, puts it, "Mandatory incarceration, longer sentences, decreased use of probation and reduced rates of parole release simply have not resulted in any material and demonstrable increase in public safety." To which the Roman Catholic Bishops of New York State add their support: "We do not believe that increasing prison incarcerations will reduce crime."

The Death Penalty

In 1972 the Supreme Court struck down all then-existing death penalty statutes as violative of the Eighth Amendment's prohibition against cruel and unusual punishment (*Furman* v. *Georgia*). The Court found that the unguided discretion with which the sentence of death had been imposed under those laws made for arbitrary and discriminatory use of capital punishment. Within a few years of the *Furman* decision more than thirty states had re-enacted new death penalty laws which either prescribed mandatory death sentences in capital cases or provided specific definitions of aggravating and mitigating circumstances that had to be weighed before imposing the sentence of death.

In 1976 the Supreme Court held mandatory death sentencing laws unconstitutional (*Woodson* v. *N.C.*) but approved in principle "guided discretion" statutes (*Gregg* v. *Ga.*), thereby reopening the country's execution chambers. Almost 40 states now have such laws on their books, and more than 1,150 people are under sentence of death.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Excluding unconstitutionally obtained evidence from use in court has vastly improved the standard of police performance.

Capital punishment, however, does not deter violent crime. The brutalizing effect of executions may even cause an increase in homicidal behavior. Death penalty states as a group do not have lower rates of homicide than non-death penalty states. Studies conducted in New York State, Philadelphia, California and North Carolina have actually shown a rise in homicide rates just before and after an execution.

The ACLU opposes capital punishment because, in violation of constitutional protections, it continues to be imposed in a discriminatory way and it remains a cruel and unusual punishment.

Racial discrimination was one of the reasons the Supreme Court struck down death penalty statutes in the 1972 *Furman* case. A study of post-*Furman* death sentences in Florida, Texas, Ohio and Georgia, completed in 1980, found no change from earlier discriminatory patterns.[7] In Texas, for example, black killers with white victims are 87 times more likely to be sentenced to death than those with black victims; among killers of whites, black offenders are six times more likely than white offenders to be sentenced to death.

Whether carried out by hanging, electrocution, firing squad, in a gas chamber, or by lethal injection, all methods used in the United States today, capital punishment is barbaric and anachronistic. Internationally, the trend is towards the abolition of the death penalty. All of the countries of western Europe and Canada have abolished it. It is ironic that the United States, which champions human rights around the world, is so out of step when it comes to the death penalty.

II. REALISTIC APPROACHES

The government's simplistic, stop gap program will not make a dent in the crime problem. It will simply expand governmental power at the expense of individual rights, potentially subjecting all of us to the abuses which would inevitably follow. But there are reforms, supported by many in the law enforcement, judicial and corrections communities, which, if implemented, would be both effective and constitutional approaches to crime. Some of these reforms have been tried experimentally in various parts of the country. Although the results have been encouraging, they have not been adopted to any significant degree.

Policing Reforms

Improved relations with the community. "Information from citizens is the lifeblood of successful policing," writes Patrick V. Murphy, President of the Police Foundation and former police commissioner of New York City, Detroit, Washington, D.C. and Syracuse, N.Y. "If citizens trust their police officers, they will provide the information police must have to deter crime." There are formidable obstacles to establishing such a relationship of trust.

Race prejudice plagues many of the police departments throughout the country. Because of unnecessary use of force, deadly and otherwise, against blacks and other minorities, minority communities tend to view the police as an occupying army rather than as their protectors. (Indeed, ACLU offices throughout the country are representing dozens of minority victims of police abuse in lawsuits for damages.)

The National Black Police Association proposes that all police officers be given awareness and black culture training to enhance their understanding of the black community. Patrick Murphy argues that the racial composition of a police department must reflect the racial makeup of the community it services. "In my experience," Murphy explains, "a police department that attempts to recruit and select blacks and other minorities for its ranks gains the trust of minority members in the community and is a better police department for its efforts."

In many localities throughout the country and especially in the South, however, police departments are the last bastion of traditional discriminatory hiring practices. In those places, in spite of large minority populations, the police forces are composed exclusively of white males. The ACLU has filed complaints on behalf of local citizens against dozens of small and medium sized Southern municipalities, asking the federal government to cut off funds until the police and other agencies adopt lawful hiring practices.

The widespread replacement of foot patrols by patrol cars is another formidable obstacle to police-community cooperation. "By changing the role of the beat patrolman," a big city police chief wrote, "we eliminated the effective, personal relationship between the police officer and the people he served. We severed communications with our greatest anti-crime ally, the citizens themselves."

Recent experiments reintroducing foot patrols indicate they have a positive effect on the community. For example, the Flint Neighborhood Foot Patrol Program in Flint, Michigan has significantly curtailed crime. While the crime rate in Flint actually increased from 1979 to 1982, it decreased by 8.7 percent in the 14 foot-patrolled areas. The largest decrease (46 percent) was in criminal sexual assault. Minor complaints such as broken windows and illegally parked cars were handled more swiftly and efficiently by officers on foot patrol, freeing patrol cars for more serious calls. And 70 percent of the residents believed their neighborhood was safer because of the presence of officers on foot patrol.

Other community-police programs that have succeeded include the Citizen's Local Alliance for a Safer Philadelphia, which assists block associations in the organization of "neighborhood walks" at night, and Seattle's Community Crime Prevention Program, which helps residents organize block watches. Crime has decreased in the neighborhoods participating in these programs.

More police intervention in incidents of domestic violence. In the U.S. today, roughly one-half of all murders and serious injuries occur within families and close-friendship groups. Approximately 13 percent of all murders involve one spouse killing another. In spite of these frightening statistics, the police and the criminal justice system in general do not treat domestic violence seriously. As one social scientist put it: "Underlying the criminal justice system is the covert toleration of wife-beating, as indicated in the policy and personal attitudes of the police, prosecutors and judges."

An experiment in Detroit, Michigan, has shown that reforms in this area make a difference. In 1978, alarmed at the increasing homicide rate, the state legislature passed a bill giving police more power to intervene in domestic disputes. That same year the Detroit Family Clinic was established and began serving two of the city's 12 precincts. The Detroit police now respond to all family trouble calls, and once they have brought the violence under control, the parties are referred to the clinic. This joint effort has led to an appreciable decrease in Detroit's murder rate.

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"By changing the role of the beat patrolman, we eliminated the effective, personal relationship between the police officer and the people he served."

Sentencing Reforms

One of the laudable goals of mandatory sentencing was to prevent the great disparities which sometimes occurred under indeterminate sentencing schemes, in which only maximum terms were mandated by statute and the judge could give any sentence, or no sentence at all, as long as it did not exceed the maximum. Moreover, because the sentence was indeterminate, the parole board could later decide how much of that sentence a convicted criminal would actually serve. But now state legislators have gone too far in denying judges any flexibility or discretion in shaping appropriate sentences for the offenders who come before them. Legislative sentencing has led to the lengthy imprisonment of many offenders who would have been good candidates for probation or some form of alternative sentence, and to the overcrowding which has reached crisis proportions in many states.

Indiana is a good example of what is wrong with mandatory sentencing. Since 1978 when the state passed its mandatory sentencing law, its prison population has increased by 15 percent each year (compared to 1 percent per year before 1978). About 40 percent of the new prison population is made up of persons convicted of minor, non-violent crimes such as second-time shoplifting. The prisons are also receiving violent offenders with extremely long terms, who have no incentive for cooperating with prison officials because under mandatory sentencing they have no chance for parole. As a result, the prisons are overcrowded and tense, yet there has been no demonstrable reduction of crime in the state.

Many reformers now support "determinate" or "presumptive" sentencing, which sets up clear guidelines but also leaves some discretion to sentencing judges. They point to the determinate sentencing law passed by Minnesota in 1980, which was designed to keep the lid on that state's rapidly expanding prison population. Basically, a "grid" formula quantifies an offender's criminal past and his current offense, and assigns the appropriate senten[illegible]dge who believes a greater or lesser senten[illegible]led for can do so but must justify his decis[illegible]iting. An offender who is sentenced to a term greater than that prescribed by the grid has the right to appeal his sentence. This compromise between mandatory and indeterminate sentencing has led to the stabilization of Minnesota's prison population at 90 percent of capacity and a drop in the proportion of property criminals in prison.

Alternatives to incarceration. Nationally, about one-half of all prisoners are behind bars not for crimes of violence, but for property crimes. Over-incarceration is at best meaningless, and at worst extraordinarily counterproductive. There is now general agreement among experts that prisons do not rehabilitate. More typically, they are crime factories. As Norman Carlson, head of the Federal Bureau of Prisons, has charged, "Anyone not a criminal when he goes in will be when he comes out."

The ACLU believes that alternatives to incarceration, particularly programs in which nonviolent offenders repay the victim or community through restitution or service, should be more widely used. There are numerous workable and effective models.

As a result of an ACLU case seven years ago, the state of Alabama established several work release centers which now accommodate 26 percent of the state prisoners. During the first eight months of 1981, the 1,000 inmates in the program earned close to $2 million, and paid some $900,000 to their dependents, to the Department of Corrections, and in state and federal taxes. In prison, they would have cost the taxpayers of Alabama $10 million instead.

New York City's Community Service Sentencing Project, run by the VERA Institute, has handled more than 1,800 non-violent offenders who were each sentenced to perform seventy hours of unpaid service for the benefit of the community. They cleaned senior citizen centers, youth centers and parks, installed smoke alarms for the elderly, and performed other useful work. Ninety percent completed their sentences, and some even continued on as volunteers.

"A sentence requiring an offender to perform community service in lieu of jail opts for reparation and rejects destructive vengeance," Judge William Erlbaum of the Criminal Court of New York says of the VERA program. "Jailing the petty offender punishes the community doubly; having suffered the crime the community must now bear the staggering costs of confining the offender ($75-100 per day per offender). Jail also instills further resentment in the offender, which, down the line, causes further crime. But for many offenders, the experience of hard labor on behalf of their neighbors produces a renewed sense of inclusion in the work force, of the rise of dormant skills, and of self worth."

Prison Reform

Prison conditions must meet constitutional standards of decency. Approximately thirty state prison systems are now under federal court supervision, many due to cases brought by the ACLU's National Prison Project. The project's first "totality of conditions" case was against Alabama, whose prisons in 1976 were found to be "barbaric and inhumane" in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The federal judge in the case, ruling that prison conditions were debilitating and made inmates worse rather than better, ordered the state to provide each inmate 60 square feet of living space, a change of linen once a week, and three wholesome and nutritious meals per day. The number of guards had to be nearly doubled to prevent physical violence among inmates. Prisoners had to be given meaningful jobs and an opportunity to participate in an educational and vocational training program. Similar orders have been issued by judges throughout the country. Rather than spending billions on new prisons, already existing facilities must be vastly improved.

Prisoners should be reclassified nationwide. Today, 70 percent of all inmates are confined in maximum security facilities. And yet, only 15-20 percent fall into the category of high security risks. Thus, most offenders are being confined in unduly restrictive institutions which are extremely costly to build, operate and maintain.

In the Alabama prison case, Judge Johnson ordered the state to reclassify all its prisoners who could be transferred to alternative facilities such as work release and community based programs. Before reclassification, only 9 percent of the inmates were considered community security risks. After reclassification, that figure rose to 32 percent and the maximum security population went from 34 percent down to a mere 3 percent.

The ACLU supports the development of a rational classification system in every state based on the rule of "least restrictive" classification. This would free maximum security space for those who really require it and would give less serious offenders greater opportunities for rehabilitation.

Vocational training and education must be improved. Perhaps the most oppressive feature of prison life is its unrelenting boredom. Typically only a fraction of a prison's inmates receive any vocational training, the rest are forced to serve their time in idleness.

"What we have to do," says New York State Corrections Commissioner Thomas Coughlin, "is to take the mass of people, the 9,000 people that we get every year, and we have to say, 'Here are the range of options. If you don't speak English, we'll teach you English as a second language. If you don't have a fifth grade education, we're going to try to give you a fifth grade education. If you want to go to school—college, we'll provide a college program for you. If you want to learn a skill, we'll provide a skill for you.' Now that's what a prison system's supposed to do. You can't just lock 'em up twenty-three hours a day, because, when you do that, prisons blow up."

Emergency measures to ease overcrowding are needed. Several states have recently enacted legislation to deal with this problem. The Michigan Overcrowding Emergency Powers Act, for example, creates a relief mechanism that is triggered when the prison population exceeds the rated capacities for thirty consecutive days. At this point prisoners within ninety days of parole eligibility become immediately eligible for parole release consideration until such time as the emergency condition is relieved. The states with similar laws have been able to prevent dangerous overcrowding in their prisons.

Conclusion

Crime is an enormous social problem for which there are no simple solutions. "Its causes are complex and no doubt reach deeply into the whole political, economic, social and psychic fabric of our way of life," says Justice E. Leo Milonas, Appellate Division, NY State Supreme Court. "Whatever the inadequacies of the courts, as well as of the other components of the criminal justice system, the disease is not caused by their deficiencies."

Acknowledging and effectively attacking crime's root causes—among them poverty, unemployment, dissolution of family ties, lack of community supports—is a task the government has been unwilling to undertake. President Reagan's Task Force on Violent Crimes explicitly declined to investigate the causes of crime, and the president himself has simplistically and unhelpfully attributed crime to man's propensity for "evil."

Catchwords and law-and-order rhetoric are poor substitutes for a serious approach to crime, one which combines short-term criminal justice reforms with long-term programs that ameliorate crime's underlying causes. We must pressure our elected officials to stop deceiving us with slogans and to start getting down to the serious business of fighting crime.

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TOO MUCH LAW, TOO LITTLE JUSTICE

An Argument for Delegalizing America

by Laurence H. Tribe

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> *And [Jesus] said Woe unto you lawyers also! for ye load men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.* Luke, 11:46

The litigious society

Undaunted even by that judgment, lawyers have overburdened more than a few societies before and since. Gibbon wrote that, after five years of legal education, law students in the Roman Empire "dispersed themselves through the provinces in search of fortune and honors; nor could they want an inexhaustible supply of business in a great empire already corrupted by a multiplicity of laws." When Gulliver traveled, he explained to one of his exotic hosts that, in England, "those who made a profession of [law] were exceedingly multiplied, being almost equal to the caterpillars in number."

Yet the United States now has three times as many lawyers per capita as England and twenty times as many as Japan. Law has never flourished in more fertile soil. In this century, the number of American lawyers has grown twice as fast as the population as a whole, and the profession is expanding more rapidly than ever. Over 126,000 students enrolled in law school in 1978—more than twice the enrollment fifteen years ago. In the same brief period, the number of lawyers has increased by more than 50 percent, from 300,000 to 460,000.

Multiplying even more quickly than lawyers are laws and lawsuits. In 1977, the legislative bodies at the federal, state, and local levels enacted approximately 150,000 new laws, and each of these new laws, on the average, required the issuance of ten new regulations. Between 1969 and 1972, the case load of the federal courts (corrected for the increase in population) rose by half. If the federal appellate case load, which accounts for only 10 percent of all federal cases, continues to grow as it has in the past decade, over one million federal appellate cases a year will flood the courts by the year 2010. And four times as many suits are filed each year in the state courts of California alone as in the entire federal system.

Clearly, something is awry. For too long we have reflexively relied on law to right every wrong. We think of the rule *of* law, justice *under* law, peace *through* law—as though law and the legal process were perfectly synonymous with fairness and equity. Our automatic reaction to injustice has been to declare, "There ought to be a law!" Each of us expects to get his "day in court."

This intoxication with law costs us dearly. Legal fees have soared to more than $25 billion a year. Because much of that expense is tax-deductible, the tax system in effect finances the litigious society. Still more perverse, some federal regulation discourages competition and boosts prices billions of dollars annually. Hundreds of thousands of people injured in automobile accidents suffer doubly because the fault system denies compensation to many and delays it to all. And each year, thousands are incarcerated at a cost of hundreds of millions of dollars for crimes that victimize no one but themselves.

While accumulating towering costs, the legal system casts only a shadow of justice. The federal Legal Services Corporation, handling a million cases annually, meets less than 15 percent of the official (and understated) need for legal services among the poor. At today's prices, the middle class too needs a legal aid program. And even those who can afford to seek justice must often wait years to find it.

An excess of law inescapably weakens the rule of law. Frustrated citizens naturally distrust an expensive, inefficient, frequently incomprehensible nonsystem that often seems contrived to serve lawyers rather than law. The scale of despair is alarming.

The sources of our predicament are not hard to discern. Our economic interactions are numerous and complex, and market mechanisms alone set few restraints on such social crimes as pollution, industrial safety hazards, and consumer fraud. At the same time, we have guaranteed individual rights and freedoms that require painstaking protection. Most fundamental, our native individualism has worn our social fabric thin, leaving virtually no enveloping system of family, community, or custom to guide or constrain each of us—as less mobile, more traditional societies could provide. Reversing cause and effect, the atomization of society has triggered an explosion of law.

Too much law, too little justice; too many rules, too few results—that is our problem. Obviously, the answer is not to abandon law or renounce all rules, leaving the powerless unprotected and inviting social chaos. The answer is to deregulate and simplify *selectively*, attacking only those laws and legal processes that aggravate injustice. The idea is hardly startling, and efforts to implement it are already under way in many precincts. The challenge is to find the links among these seemingly unrelated efforts, and to forge them into a unified program to delegalize America.

Selective deregulation

Deregulation can restore competition to areas where the regulatory agencies have served as the agents of those they purport to regulate. Regulation in such areas was originally justified by the need to protect infant or otherwise vulnerable industries from "destructive" competition. The government has set floors on the prices certain industries may charge for their products or services, has restricted entry by newcomers into those and other industries, and has at times guaranteed minimum levels of profitability. Whether or not the "infant industry" justification should ever have been accepted, it is clear that consumers have had to bear the costs of such protectionism—no longer with even arguable justification.

And those costs have been substantial. A 1977 General Accounting Office study estimated the cost to consumers of regulating air transport at over $2 billion a year. Since then, thanks to the work of Senator Kennedy and the Carter Administration, the Civil Aeronautics Board has been stripped of much of its authority over air freight and passenger fares—in favor of private market forces. Now fares are falling (and profits are rising) because more Americans can afford to fly. In 1978, the CAB admits, passengers saved $2.5 billion as a result.

Similar deregulation in the trucking industry could save consumers as much as 10 percent of the $110 billion spent annually on truck transportation. Government interference with market forces in other industries also exacts a high price from consumers. The annual cost of Interstate Commerce Commission regulations resulting in excess rail capacity is at least $3.5 billion. The Federal Maritime Commission's regulation of ocean shipping may inflate rates by 45 percent. Federal milk marketing regulations cost $100 million annually and generate a sharp income transfer upward. And regulation pads the price of cable television by one to two billion dollars a year.

By gradually deregulating specific activities, we may begin to recapture such social costs as these. The airlines were not the first to realize the benefits of a deregulated market. When the Securities Act Amendments of 1975 ended the system of fixed brokerage commission rates on stock transactions, institutional brokerage rates fell more than 45 percent and individual rates more than 15 percent—with total savings of $700 million by the fall of 1976.

For all the talk of deregulation as a boon to free enterprise, however, the fiercest opposition to deregulation that will promote competition comes from industry itself. Trucking lobbyists have fought to keep Senator Kennedy's trucking deregulation bill out of his Senate Judiciary Committee and to consign it to the legislative graveyard of the Commerce Committee instead. Nor is such opposition to pro-competitive deregulation atypical, for many businessmen who decry government intervention in the marketplace consider such deregulation inimical to their own interests. Selective deregulation must therefore distinguish between regulations that insulate corporations from competition with one another and regulations designed to protect consumers, workers, and the environment from industrial depredation.

Deregulation is thus hardly a categorical imperative.

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The degrees to which the various regulatory agencies serve the public interest vary widely. Many agencies passed through the crucible of an age of reform and today serve worthy goals—environmental protection, occupational safety and health, consumer and motorist safety. Other agencies, established as guardians of fledgling or infirm industries such as trucking and shipping, continue to interfere with market forces long after the supposed need for such interference has ceased. Separating those activities that ought to remain regulated from those that should be deregulated is clearly a manageable task.

Of course, even the best of the protective agencies have committed some egregious errors—to the glee of their enemies and the discomfiture of their friends. But such blunders have been wildly exaggerated. Infant deaths from crib strangulation and household poisons have been cut in half by product safety standards requiring closely spaced crib slats and childproof containers for dangerous substances. An estimated 200,000 Americans would not be alive today but for the federal automobile and highway safety standards enacted since 1966. Carbon monoxide levels in eight representative cities declined 46 percent between 1972 and 1976—a decline which may be linked to the recent reduction in heart disease. And worker exposure to harmful doses of coal dust, asbestos, lead, and other toxic substances has been substantially cut.

Notwithstanding the common wisdom that the public opposes all government regulation, California voters approved $375 million for pollution controls on the very day they approved Proposition 13—and by nearly the same margin. Opinion Research Corporation surveys show public support for regulations to protect worker health and safety by a margin of four to one, consumer safety by a margin of three to one, and environmental quality by two to one. Thus the public's praise of deregulated air fares, for example, may not demonstrate broad public antipathy toward regulation in all sectors.

Dire predictions that protective regulation will invariably cost more than society can afford are themselves highly inflated. In the early 1970s, chemical manufacturers warned that a federal standard for worker exposure to vinyl chloride (a potent carcinogen) would cost $65 to $95 billion and destroy two million jobs. "The standard is simply beyond the compliance capacity of the industry," their trade association boldly asserted. As consumer advocate Mark Green has noted, the standard was nevertheless imposed—at a cost one-twentieth of the industry's frenzied overestimate, and with no loss of jobs.

For many years, protective agencies had to bluff their way through such prophesies of fiscal ruin, hoping that the alarums of regulated industries would prove unwarranted. In those days, it seemed farfetched to defend protective regulations in "hard" terms of dollar benefits, for who could say whether a beautiful sunset was worth the cost? No longer are the protective agencies on the defensive, however. A brand-new study by scientists working under a grant from the Environmental Protection Agency concludes that protective regulation may not only be less costly than its critics have maintained, but may even be *profitable*. These scientists reported that, as of 1977, the federal government was reaping $8 billion in benefits from a pollution-control program that cost only $6.7 billion. Under this program, particulate pollution from certain stationary sources (that is to say, smog and soot from power plants and factories) had been cut 12 percent since 1970. The study estimated that, by reducing the amount of such pollution by 60 percent, the government could increase labor productivity by $36 billion and realize an additional $4 billion gain from reduced mortality. In the Los Angeles basin alone, the study predicted, real estate values would jump $950 million a year—$500 per household—if smog were cut by only 30 percent.

Figures such as these clearly demonstrate the benefits of protective regulation in terms that would persuade the most severe cost accountant—which is not to say that the intangible benefits of protective regulation should be ignored. Both "hard" and "soft" values demonstrably served by the protective agencies offer good reason not to let our frustration with excessive regulation lead us into mindless deregulation.

Simplification

Just as it would be a mistake to equate the deregulation of consumer prices with the dismantling of consumer protection, so it would be a mistake to equate acceptance of regulation in a particular area with complacence about that regulation as it is currently structured and administered. Often, where we cannot or should not deregulate, we should still delegalize. For example, we can replace complex, ineffectual, uniform standards for water and air pollution with simpler effluent fees—that is, require manufacturers to pay as they pollute, rather than prohibit pollution or set pollution limits—thus making pollution subject to self-regulation by manufacturers, and thereby reducing government's role without sacrificing regulatory goals. Such an approach might regulate more effectively—but with fewer rules, fewer lawsuits, and, in effect, less law. Charles Schultze, chairman of the Council of Economic Advisers, has endorsed this technique more broadly, arguing that, in many cases, fees or incentives would be preferable to the "command control" system of direct regulation. Under this approach, the government can influence private behavior by using, not discarding, market mechanisms.

The difference between direct and indirect regulation of private behavior is illustrated by the case of worker safety. Federal law directs the Occupational Safety and Health Administration to set safety and health standards for the workplace, inspect firms, and assess fines for violations. Enforcement is necessarily ineffective under such a direct approach, for there are 5 million workplaces in the United States and OSHA cannot possibly inspect more than a tiny fraction of them each year—or ever. With detection unlikely and the threat of penalty therefore remote, many employers have disregarded OSHA workplace standards. Consequently, 14,000 workers still die and two million others are injured each year in accidents on the job.

At least one alternative to the direct approach could radically improve the situation. Taxing employers for on-the-job injuries to their workers would provide an effective incentive to guard against workplace accidents in the most cost-effective way. This and other self-executing enforcement devices would better serve the purposes now entrusted to an intrinsically inadequate inspection system. Workers themselves would enforce OSHA's standards—by filing accident reports. OSHA inspectors could then concentrate on workplace conditions that are likely to cause injuries that may not manifest themselves for years—injuries that workers may not even associate with their work sites.

Decomplicating antitrust

Selective deregulation can clear much of the legal pollution that suppresses fair competition and keeps prices artificially high. But, even where deregulation is needed, rote dismantling of big government could leave consumers at the mercy of corporations big enough to dominate whole industries. No invisible hand will operate where concentrated business has a visible grip on entire sectors of the economy. The policy of selective deregulation demands a freer market, not a market in which government control has been replaced with control by corporate power.

Yet concentrated business maintains its grip on various sectors of the economy largely because antitrust law has itself become a study in overlegalization. To bring an antitrust action against any large corporation amounts to a declaration of judicial war. Armies of lawyers must be enlisted to wage one– Exxon, for example, has on retainer more lawyers than the entire U.S. Department of Justice. Some clashes last for years. For private antitrust cases reaching trial, the median time between filing and disposition, for cases decided in 1977, was 44 months. A charge brought under § 2 of the Sherman Act will consume, on the average, eight years before a final judgment is rendered.

And many cases simply never end—they just fade in and out. In 1932, the Justice Department had antitrust suits pending against AT&T and IBM, and had just signed consent decrees with General Electric and Westinghouse. In 1952, the scene was the same; indeed, little had changed by 1977 (see "Corporate Star Wars," May 1979 *Atlantic*). In such cases as these, legal wizards can mock the law with mountains of motions and by burying their opponents in blizzards of paper. In one IBM suit, the plaintiff produced almost 26 million pages of documents. The defendants produced 4 million pages and 60 million supporting documents.

Surely a celestial visitor would think us mad if informed that we endeavor to promote economic efficiency through this process. He would not be surprised to hear that the attempt has utterly failed. In 1973, the 100 largest firms controlled nearly the same share of the nation's assets as did the 200 largest firms in 1948. This concentration of economic power, according to the best available estimates, costs consumers between $150 and $180 billion a year in price overcharges, or about $2000 per family. In the face of these inflexible overcharges, attempts to restrain inflation through budget cuts and tight credit fail while aggravating unemployment and risking recession. Secure from competition, concentrated industries also tend to resist change. The National Science Foundation has concluded that every dollar spent for research and development by small firms is twenty-four times more productive than the same dollar spent by big firms.

The problem lies not in the antitrust idea but in its implementation. Strict judicial management, for example, could reduce antitrust delays. Judicial districts with stringent time controls resolve cases as much as 50 percent faster than districts with more relaxed schedules. Reducing the number of relevant antitrust issues would also limit litigation. Lawmakers have spent much of the period since the Sherman Act was passed nearly a century ago tailoring legal rules to ever finer factual nuances. The result has been not swifter or surer justice, but more and bigger lawsuits. Rougher—but readier—rules of thumb would better serve both litigants and the public interest.

For example, an action under § 2 of the Sherman Act now requires proof of two elements: monopoly power and culpable conduct with intent to acquire or maintain that power. Generally, one third to one half of antitrust trial time is spent—or wasted—on the issue of culpable conduct. Dispensing with that overburden of proof, and instead requiring only a showing of persistent monopoly power, would remove the greatest statutory cause of protracted antitrust lawsuits. A defendant corporation would still be entitled to persuade a court that its monopoly power was based on a lawful use of patents, or that divestiture would destroy substantial economies of scale. (Such economies result when the fixed cost of producing or distributing a product or service, or the cost of producing or distributing different items together rather than separately, makes it wasteful to operate at low volume or without combining separate operations.) Allowing an alleged monopolist to point to economies of scale in self-defense in the few cases where that justification is acceptable makes far more sense than forcing the government to prove illicit acts or motives in the many cases where monopoly power may claim no such justification.

Congress could also limit the scale of these cases by formulating a federal antitrust code to clarify questions that have chronically troubled the courts since 1890. Finally, Congress should consider the direct reorganization of certain sectors of the economy. The problems of concentration and monopoly in the oil, computer, automobile, and other basic industries might be addressed more fruitfully by Congress than by the courts.

Dejudicialization

These reforms do not touch the plight of the ordinary citizen seeking justice in court. Over fifty years ago, Judge Learned Hand scolded the bar of New York City: "As a litigant, I should dread a lawsuit beyond almost anything short of sickness and death." Today, legal expenses alone could make Judge Hand sick; and if court backlogs grow at their present rate, our children may not be able to bring a lawsuit to a conclusion within their lifetime. Legal claims might then be willed on, generation to generation, like hillbilly feuds; and the burdens of pressing them would be contracted like a hereditary disease. Resort to law would be the nightmare described by Dickens in *Bleak House*—a dismal rite that "so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honorable [lawyer] who would not give—who does not often give—the warning, 'Suffer any wrong that can be done you rather than come here!' "

The time and expense of righting wrongs have themselves become glaring inequities. The law obstructs justice when a five-year wait for a federal courtroom is common. But a number of tested alternatives can ease the plight of the individual litigant. Many disputes can be avoided altogether, and others can be resolved without recourse to a courtroom.

One of the most dispensable judicial tasks is the determination of fault in personal injury cases. The legal expenses involved inflate insurance premiums for everyone. Injured claimants wait endlessly for compensation, while unpaid medical bills accumulate. Hundreds of cases clog court dockets and delay justice in disputes where the adversary process is essential. No-fault automobile insurance—at least for bodily injuries—is the first widely adopted scheme of dejudicialization, and it has already shown its superiority to the fault system. A Department of Transportation study of the sixteen states with no-fault systems found that victims in those states receive fairer compensation faster than victims in other states. Under New York's no-fault system, the average time spent waiting for payment has been cut to three months—from an average of sixteen months under the old fault system. Three quarters of the premium dollar now goes to accident victims—50 percent more than under the fault system, which diverted huge sums from compensation to litigation. Over 99 percent of New York accident victims—40 percent more than under the fault system—are compensated for all medical expenses, and for as much as $1000 a month of lost wages.

Following the adoption of no-fault in Massachusetts, the court dockets for the three largest districts in Middlesex County—an area extending from the Boston suburbs to the New Hampshire border—showed a drop of 93 percent in the number of negligence suits for bodily injuries in an automobile accident. Statewide, the number of motor vehicle tort suits has declined 87 percent since the passage of no-fault in 1970. Naturally, these statistics leave some attorneys very unhappy. Of Massachusetts lawyers responding to a recent survey, 17 percent reported that the adoption of no-fault had hurt their practices. These lawyers noted that over half their income prior to no-fault had been derived from motor vehicle injury cases. The American Trial Lawyers Association, the guild for lawyers who specialize in personal injury litigation, has narrowly defeated attempts to extend no-fault coverage nationally. In 1976, the Senate defeated no-fault 49 to 45, and the movement to no-fault in the states has stalled. Although the Carter Administration has endorsed no-fault, its prospects remain doubtful in the face of fierce lobbying from trial lawyers, who often carry political clout in local communities. Thus, the injured in many states will continue to be detoured through a legal jungle, scraped raw by the underbrush of needless and costly litigation that benefits only the professional litigators.

For disputes that call for adversary process, promising alternatives to current practice are already available. The Justice Department is experimenting in three cities with Neighborhood Justice Centers that resolve disputes through mediation and arbitration. Center mediators handle family arguments, minor assaults, and consumer-merchant, landlord-tenant, and employer-employee disputes. Citizens may bring complaints to the center themselves, or they may be referred by judges, the police, Legal Aid, or government agencies. One mediator or more may then hear a dispute and try to negotiate a written settlement without intervention by counsel. Compared to courts, the Neighborhood Justice Centers are models of both speedy justice and government economy. Hearings at the Kansas City center, for example, commonly take two hours. Thirteen days elapse, on the average, between first hearing and a case hearing. Of all cases that have been heard, 86 percent have been successfully negotiated. And each Neighborhood Justice Center has cost approximately only $135,000 a year.

Decentralized, less formal judicial procedures can bring justice within the reach of a majority of Americans. Literally mobile courts, which would be to halls of justice what bookmobiles are to libraries, could ride circuit from neighborhood to neighborhood in big cities, and from town to town, each one staffed by a judge and trained aides. Satellite courthouses in each of several communities could hold weekly or bimonthly court sessions in the evenings, with judicial personnel making regular rounds from court to court.

Another reform that can divert cases from the usual treadmill of adjudication is arbitration. In one California county, 80 percent of arbitrated cases have been concluded without formal judicial proceedings. Last year, the California legislature voted to provide mandatory arbitration statewide for all cases under $15,000. If either party challenges the award, the case goes to trial; but if the challenger comes out worse off in court, he can be ordered to pay the other side's expenses for both the litigation and the earlier arbitration.

Less law, more justice

Delegalization has wide appeal. One sensible course would be to eliminate regulations that serve no purpose and result in pointless costs and delays, to simplify needlessly complex laws and judicial processes that now frustrate the very goals they were designed to achieve. Such reforms, of course, are more easily proposed than accomplished. Anguished cries arose from boardrooms and law firms throughout the country last January when the Attorney General received the final report of the National Commission for the Review of Antitrust Laws and Procedures, which recommended major reforms to speed and simplify antitrust cases. At every step, those who gain from regulatory schemes that hurt the public may be expected to resist reform with all of the considerable resources at their command.

. Nevertheless, the future of delegalization seems promising. As chairman of the Senate Judiciary Committee, Senator Kennedy is likely to press vigorously for reform—not only in the realm of antitrust law but in other areas requiring delegalization as well. He has proposed a special court to expedite tax appeals. He would remove so-called "diversity" cases—usually involving automobile accidents in which the parties are citizens of different states—from the federal courts, where they currently jam the calendar. Other reforms would encourage arbitration instead of trials in more civil suits and would assign petty criminal cases to magistrates rather than judges. Localities could obtain federal assistance to establish non-judicial methods of dispute resolution. Kennedy has perceived that broader access to justice—one of his main themes—is not only compatible with a trimmer legal system but in fact cannot be achieved in the absence of a legal system that society can afford. While Senator Kennedy is toiling in the vineyard of legislative reform, the Carter Administration is developing its own proposal for "regulatory experiments" to reduce the number of regulations and replace them with economic incentives for industries to police themselves. And the American Bar Association is reviewing no-fault malpractice insurance.

Although delegalizing America is grounded in good sense, it is a program inviting exploitation by those who would reap the benefits of its nearly universal appeal without working to achieve its goals. Worse still, those who favor a return to the unregulated days of the robber barons may try to twist a genuine program of delegalization into a scheme to dismantle the entire system of protective regulation that serves the public well—and could, if reformed, serve the public even better. But a serious commitment to delegalization need not succumb to such tawdry designs. It can mean progress without legal excess. Properly conceived and implemented, delegalization can transform the rule of law from a source of frustration into a foundation for a more just society. ☐

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COORDINATION OF STATE AND FEDERAL JUDICIAL SYSTEMS

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INTRODUCTION

The coexistence of state and federal systems accords each person the benefits of dual citizenship while subjecting all individuals to two sovereignties.[1] This dichotomy becomes particularly striking when considering the state and federal courts, two independent systems whose interplay often perplexes the citizen as well as the theorist visualizing the law as an integrated whole. This Article explores some of the problems in coordinating the state and federal judicial systems from the perspective of a federal trial judge in a large metropolitan area. Power to coordinate belongs primarily to state and federal legislators, executive agencies, and, in the case of criminal matters, to prosecuting attorneys and police personnel. Nevertheless, cognizant of their limitations, courts should take

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[1] Article III of the Constitution delineates the judicial powers of the United States. *See* U.S. CONST. art. III, § 2; C. WRIGHT, LAW OF FEDERAL COURTS § 8, at 19 (1976). Congress is empowered to imbue such courts as it might establish with these enumerated powers. U.S. CONST. art. III, § 1; C. WRIGHT, *supra*, § 11, at 29. Congress, moreover, has the power to grant to the federal courts exclusive jurisdiction in these areas. *Id.* § 45, at 193; *see* Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 509-10 (1957). In the absence of congressional dictates, however, the jurisdiction of the federal courts is shared by the courts of the several states. C. WRIGHT, *supra*, § 45, at 193; *see* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962); Claflin v. Houseman, 93 U.S. 130, 136-40 (1877). *See generally* M. WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS 269 (1949); *State Courts and Federalism in the 1980's*, 22 WM. & MARY L. REV. 599, 599 (1981).

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whatever steps possible to ensure that the two systems properly mesh.

JUDICIAL REFORM AND STATE-FEDERAL JUDICIAL COUNCILS

In recent years, much progress has been made in streamlining the New York courts. The work of the Tweed Commission in the 1950's[2] and subsequent constitutional and statutory amendments have increasingly rationalized the New York court structure. Chief Judges Desmond, Fuld, Breitel and Cooke, Justice McNally, the bar associations, and such lay groups as the League of Women Voters and the Committee for Modern Courts have, with many others, participated in this enterprise. Similar efforts may be noted in other states.[3] In some instances, state reforms have been stimulated by the need to conform to higher institutional standards set forth by the Supreme Court and state appellate courts.[4] In addition, quasi-public groups, such as the National Center for State

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[2] The New York Temporary Commission on the Courts, chaired by Harrison Tweed, prepared extensive analyses of the judicial systems of New York and other jurisdictions. J. Weinstein, H. Korn & A. Miller, New York Civil Practice, at vii-viii (1981). The legislative and constitutional reforms urged by the commission, *see* 1955 Report of the New York Temporary Commission on the Courts, were aimed at creating a unified court system in New York State. Weinstein, *The Role of the Chief Judge in a Modern System of Justice*, 28 Rec. A.B. City N.Y. 291, 292 (1973). The work of the Tweed Commission weighed heavily in the subsequent overhaul of the state judiciary, which culminated in 1962 with the establishment of a unified court system. *See* N.Y. Const. art. VI, §§ 1-37.

[3] The Illinois General Assembly approved a resolution that put before the electorate a "Blue Ballot Court Reform Amendment." Pusateri, *The Need to Complete Court Reform in Illinois*, 48 Chi. B. Rec. 108, 108 (1967). Approved in 1962, the reform measure significantly revised article VI of the Illinois Constitution. *Id.*; *see* Ill. Const. art. VI. Supporters of the referendum viewed the amendment as an important step toward simplifying the court structure, providing for administrative control, adjusting supreme court jurisdiction to new conditions, and providing more effective appellate court functions. Chandler, *The New Judicial Article for Illinois*, 50 Ill. B.J. 654, 658-63 (1962). The Illinois court reform experience has been viewed as a model for reform programs in other jurisdictions. Ashman & Parness, *The Concept of a Unified Court System*, 24 De Paul L. Rev. 1, 19 (1974); *see* Comment, *Court Reform—Suggested Legislative Action Under the 1962 Constitutional Amendment*, 42 N.C.L. Rev. 858, 858 (1964).

[4] The Supreme Court's role in enunciating criminal justice standards typifies the manner in which federal activity shapes state procedures. Decisions such as Miranda v. Arizona, 384 U.S. 436 (1966), announcing new constitutional guidelines for custodial police interrogations, require that many states modify their existing procedures. *See* Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 Wm. & Mary L. Rev. 789, 791 (1981). Although state judges often have been less than receptive to federal influence, it has been suggested that such federal rulings are necessitated by the states' failure to institute timely reforms on their own. *Id.* at 790-91.

Courts,[5] the Commissioners on Uniform State Laws,[6] the Judicial Administration Division of the American Bar Association,[7] and the American Law Institute[8] have contributed to this restructuring.

In the federal arena, Chief Justice Charles Evans Hughes was instrumental in urging judicial streamlining.[9] More recently, Chief Justice Burger has been active in this effort.[10] Administratively, procedurally, and in the scope and organization of its work, the federal court system is quite different from what it was 50 years ago when there were less than 300 federal judges. Today, they number over 800.[11] With that numerical growth has come a commensurate change in character, as the federal court system modified itself to meet the strains of modern litigation in an increasingly complex society while confronting heightened standards of due process and equality. Among the changes have been the development of class actions;[12] the expansion of complex multidistrict litigation practice;[13] the extension of magistrate jurisdiction;[14] the implementation of research and training programs for judges and supporting personnel;[15] the strengthening of the United States Judicial Conference and Circuit Councils;[16] the creation of a sophisticated computer system;[17] the promulgation of speedy trial rules,[18] uniform rules of evidence,[19] criminal procedure rules,[20] and rules of

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[5] Proposed by Chief Justice Warren Burger in 1971, the National Center for State Courts was created to provide a central meeting place where state judges could exchange ideas and develop programs for the improvement of their respective court systems. Located in Williamsburg, Virginia, the center continues to play an important role in the research, proposal and implementation of policies designed to improve the administration and management of courts throughout the country. *See* NAT'L CENTER FOR STATE COURTS, 1977 ANNUAL REPORT 3 (1978).

[6] The National Conference of Commissioners on Uniform State Laws was first held in August 1892, and has since met annually to discuss proposals for uniform legislation. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS HANDBOOK 403 (1980). The organization's constitution states that "[i]t is the object of the National Conference to promote uniformity in the law among the several states on subjects where uniformity is desirable and practicable." *Id.* at 404. When a uniform statute is deemed necessary in a particular area of law, the subject is studied by an appropriate committee, and a draft of the uniform legislation is drawn. Upon approval by the national conference, the legislation is recommended for passage by the state legislatures. *Id.* at 403. The national conference has contributed greatly to the coordination of state judicial systems by promulgating the Uniform Class Actions Act, the Uniform Certification of Questions of Law Act, the Uniform Rules of Criminal Procedure Act, and the Uniform Declaratory Judgments Act. *Id.* at 453-54.

[7] In an effort to improve the administration of justice in the United States, the Judicial Administration Division of the American Bar Association sponsors the National College of the State Judiciary, an institution offering judges an opportunity to improve their skills through further education and training. Founded in 1963, thousands of judges have benefited from the educational opportunities afforded by the National College. According to Chief Justice Warren Burger:

> The National College of the State Judiciary has made the single most significant contribution to th[e] rising trend of continuing education for state judges. The College provides a major service by orienting new judges to aspects of their work. This assistance includes the study and exchange of ideas on problems concerning judicial techniques, such as the presiding function, the internal administration of a court and the preparation of jury instruction.

Statement of Chief Justice Warren E. Burger, at the Judge-Law Professor Interaction Seminar on Judicial Administration (Nov. 8, 1974).

[8] Founded in 1923, the American Law Institute undertook to publish a restatement of the law to assist the legal community in dealing with the complex and uncertain state of American law. AMERICAN LAW INSTITUTE, THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 15 (2d ed. 1973). According to one commentator, the role envisaged by the institute

> was to undertake an exhaustive study of the law of the United States in order to state that law in ideal terms, which should take account of new social needs and at the same time form a common pattern for judicial decision, to the end that the maladjustments of law to contemporary conditions and the evils of the law's diversities might thereby be alleviated.

Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 461, 461 (1936). The Institute, additionally, has developed proposals for facilitating the certification of questions of law between federal and state courts, and has authored various research projects such as the "Study of the Division of Jurisdiction Between State and Federal Courts." *See* C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 60, 69 (1969).

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[9] Hughes, *Address of the Chief Justice*, 12 A.L.I. Proc. 54, 55, 57 (1935). Prior to the efforts of Chief Justice Hughes, court reform was the topic of Roscoe Pound's presentation, "The Causes of Popular Dissatisfaction with the Administration of Justice." *See Roscoe Pound Kindles the Spark of Reform*, 57 A.B.A. J. 348, 348-51 (1971). *See generally* Kirsch, *A History of Court Administration—The American Experience*, 55 Judicature 329, 329-33 (1972). An early work on court reform was drafted by Pound, together with Louis D. Brandeis and other eminent legal scholars. The work addressed the "inadequacy of the legal and judicial system to achieve the purposes for which law and courts exist." Eliot, Storey, Brandeis, Rodenbeck & Pound, *Preliminary Report on Efficiency in the Administration of Justice*, in Judicial Administration: Text and Readings 47, 48 (R. Wheeler & H. Whitcomb eds. 1977). Chief Justice William Howard Taft was also an early proponent of reform measures in the interest of judicial efficiency. His address before the Chicago Bar Association on December 27, 1921, included proposals for the appointment of additional district court judges, plans for the simplification of procedural rules and suggestions for changes in Supreme Court jurisdiction. Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34, 36 (1922).

[10] Chief Justice Burger has been an ardent supporter of court reforms. Burger, *Report on the Federal Judicial Branch—1974*, 60 A.B.A. J. 1193, 1193-94 (1974); *see supra* note 7; *infra* note 22. In particular, his concern has focused upon the extensive delays which prevent cases from being tried in an expeditious manner. Burger, *The Courts on Trial: A Call for Action Against Delay*, 44 A.B.A. J. 738, 741, 798 (1958).

[11] In 1981, there were 826 circuit, district and other federal court judges, representing 5.8 percent of the total personnel in the federal system. Administrative Office of the United States Courts, 1981 Annual Report 152, table 19 (1982).

[12] Class action suits, which allow representatives of a class of parties to sue or be sued, may be brought only if four requirements are satisfied. First, the class must be so large as to render joinder impracticable. Second, questions of law or fact must exist that are common to the class. Third, claims or defenses of representative parties must be typical of those of the class. Finally, the representatives must be able to protect "fairly and adequately the interests of the class." Fed. R. Civ. P. 23(a)(1)-(4). Class actions have proved useful in situations where large numbers of persons have suffered damage as a result of a single incident.

[13] In 1968, Congress provided for the transfer, to a single judicial district, of actions pending in different courts dealing with common legal issues. Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (1976 & Supp. IV 1980)). Congress enacted this procedure in response to the enormous burdens imposed upon the courts as a result of the hundreds of electrical equipment antitrust cases initiated in the early 1960's. *See* Neal & Goldberg, *The Electrical Equipment Antitrust*

Cases: Novel Judicial Administration, 50 A.B.A. J. 621, 622-28 (1964). The complex rules and procedures established for such consolidation are supervised by the Judicial Panel on Multidistrict Litigation. *See generally* Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORDHAM L. REV. 41, 44-46 (1971); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1006 (1974). The consolidation of recent actions by the judicial panel suggests that the procedure is "succeeding in its primary function: preventing a few major disputes from nearly monopolizing the federal judiciary." Ranii, *Speedy Complex Litigation*, Nat'l L.J., Mar. 1, 1982, at 1, 38, col. 1.

[14] *See* 28 U.S.C. § 636 (1976 & Supp. IV 1980). Acknowledging congressional intent to expand magistrates' powers, the Supreme Court has been unwilling to accept litigants' arguments that their claims were unfairly prejudiced by the performance of certain functions by magistrates. *See, e.g.*, Mathews v. Weber, 423 U.S. 261, 268 (1976) (" '[t]he [Federal Magistrates] Act grew from Congress' recognition that a multitude of new statutes and regulations had created an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance' ").

[15] *See* 28 U.S.C. § 620(b)(1)-(4) (1976). In 1978, approximately 5,000 judicial personnel, including judges, magistrates, circuit executives, and clerks, utilized the educational and training programs of the Federal Judicial Center. FEDERAL JUDICIAL CENTER, 1978 ANNUAL REPORT 41 (1978).

[16] The Judicial Conference of the United States, established by statute, is responsible for analyzing the conditions existing among the federal courts and suggesting improvements to aid in the administration of justice. *See* 28 U.S.C. § 331 (1976 & Supp. IV 1980). The Circuit Councils, consisting of judges from a particular circuit together with that circuit's chief judge, are intended to assist in the development of initiatives aimed at improving judicial administration. The councils have been criticised, however, for being ineffective. *See* Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 204 (1970). The contribution of the councils in bringing about necessary reforms nonetheless may be expected to improve since extensive amendment of their authorizing statute recently has taken place. *See* 28 U.S.C. § 332 (1976 & Supp. IV 1980).

[17] *See infra* note 59.

[18] The inability of the judicial system to try cases swiftly has been a concern of both the bench and bar. *See supra* text accompanying notes 5-10. This concern, particularly with regard to criminal trials, also has been shared by Congress, and is reflected in the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 50(b). The current version of rule 50(b) contains a reference to the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1976 & Supp. IV 1980). *See* 3 J. MOORE, MOORE'S FEDERAL PRACTICE RULES PAMPHLET 514 (1982). The purpose of the Act is "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial . . . ." H. R. REP. No. 1508, 93d Cong., 2d Sess. 1, 9, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7401, 7402. Toward this end, the Act enunciates various time limits to be implemented on a staggered basis, *see* 18 U.S.C. § 3161(f), (g) (1976), the ultimate goals of which are a 30-day limit between arrest and indictment, *id.* § 3161(b), and a 70-day limit between the filing of the indictment and the trial, *id.* § 3161(e)(1) (Supp. IV 1980).

[19] The need for uniform rules of evidence was recognized by many commentators early in this century. *See* 2 J. MOORE, *supra* note 18, at 1-3. One such commentator described the

civil procedure;[21] as well as the development of professional judicial administrators.[22]

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law of evidence in the federal courts as "not only inferior but far inferior" to that in the courts of the fifty states. Wigmore, *A Critique of the Federal Court Rules Draft—Three Larger Aspects of the Work Which Requires Further Consideration*, 22 A.B.A. J. 811, 813 (1936). Notably, in the case of Michelson v. United States, 335 U.S. 469 (1948), the Supreme Court cited the need for uniform rules of evidence in the federal courts. *See id.* at 486. In 1965, Chief Justice Warren appointed an advisory committee to formulate uniform rules, C. WRIGHT, *supra* note 1, § 93, at 458, and on February 5, 1973, the Supreme Court presented to Congress the Federal Rules of Evidence, 2 J. MOORE, *supra* note 18, at 6. Congress, however, then passed a statute dictating that such rules would not take effect without congressional approval. *See* Act of March 30, 1973, Pub. L. No. 93-12, § 2, 87 Stat. 9. After several changes in the draft approved by the Supreme Court, the Federal Rules of Evidence were adopted by Congress, and became effective July 1, 1975. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, § 2(a)(1), 88 Stat. 1926; C. WRIGHT, *supra* note 1, § 93, at 456. The Federal Rules of Evidence expressly are intended "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. Many states have adopted the Federal Rules of Evidence in one form or another. *See infra* note 24 and accompanying text.

[20] In 1940, legislation was adopted that conferred upon the Supreme Court the authority to make rules applicable to criminal cases prior to verdict. *See* Act of June 29, 1940, ch. 445, § 687-89, 54 Stat. 688 (codified at 18 U.S.C. § 3771 (1976 & Supp. IV 1980)). On December 26, 1944, the Federal Rules of Criminal Procedure were promulgated, Order of December 26, 1944, 323 U.S. 821 (1944), and became effective on March 21, 1946, *see* C. WRIGHT, *supra* note 1, § 63, at 296-97. The Federal Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." FED. R. CRIM. P. 2. Notably, the rules have undergone substantial amendment since their adoption. *See generally* 2 J. MOORE, *supra* note 18, at 1.

[21] Like the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure offer a uniform procedural system, serving to standardize the litigation process and minimize confusion in civil cases. They apply to "all suits of a civil nature" brought in federal courts. FED. R. CIV. P. 1. The rules provide that "[t]hey shall be construed to secure the just, speedy, and inexpensive determination of every action." *Id.*; *see* 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 1.13[1], at 284-86 (2d ed. 1982).

[22] In an address delivered to the Institute of Judicial Administration on August 12, 1969, Chief Justice Warren Burger called for the creation of "a corps of trained administrators" to alleviate some of the burdens of judicial administration which constitute a great part of a judge's workload. Burger, *Court Administrators—Where Would We Find Them?*, 53 JUDICATURE 108, 108 (1969). Congress responded to this need by passing legislation that authorized the appointment of a circuit executive in each judicial circuit. Act of Jan. 5, 1971, Pub. L. No. 91-647, § 1(a), (f), 84 Stat. 1907 (codified at 28 U.S.C. § 332(e)-(f) (1976)). Although the statute does not purport to provide a definitive list of responsibilities that the circuit executive must assume, many administrative duties are suggested, including administration of the personnel system and budget of the court of appeals of the circuit, maintenance of a modern accounting system, and collection, compilation, and analysis of statistical data with a view to the preparation and presentation of reports based upon such information. A commentator familiar with the duties of judicial administrators has observed that the success of an administrative system depends upon the existence of an integrated judicial system, supervised by a state's highest court. Carrigan, *The Functions of State Court Ad-*

Many of these changes have tended to emphasize the separate character of the two systems. For example, in the adoption of the Federal Rules of Civil Procedure, Criminal Procedure and Evidence, the Supreme Court primarily opted for national uniformity among the federal courts, rather than federal conformity to state and local norms.[23] While it is true that many states have adopted all or most of these federal reforms,[24] currently, at least in New

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ministrator, 46 JUDICATURE 30, 30 (1962). An effective administrative program, once in operation, will allow judges more time to decide cases, and gradually provide the administrator with the expertise necessary to develop new methods of improving judicial efficiency. *See* Burger, *Deferred Maintenance*, 57 A.B.A. J. 425, 428 (1971).

[23] Conformity by federal courts to state and local procedure was statutorily mandated in 1792. *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. The statute was described as one requiring "static conformity," since the courts were to follow the state practice as it existed on September 29, 1789, regardless of subsequent changes made by the states. *See* C. WRIGHT, *supra* note 1, § 61, at 289. This system of "static conformity" was later abolished, however, with the enactment of the Conformity Act of 1872, adopting a "dynamic conformity" to state rules. *See* Act of June 1, 1872, ch. 255, §§ 4-6, 17 Stat. 197; C. WRIGHT, *supra* note 1, § 61, at 290; Clark and Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 401-11 (1935). While the Conformity Act was more flexible than its predecessor, its many exceptions resulted in uncertainties as to when and where procedures should be conformed to state law. *See generally* C. WRIGHT, *supra* note 1, § 61, at 290-91. Many believed that procedure could be better regulated by the courts than by the legislature. *See id.* § 62, at 291. Accordingly, pursuant to the Enabling Act passed by Congress in 1934, Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1976)), the Supreme Court adopted the Federal Rules of Civil Procedure, Order of Dec. 20, 1937, 302 U.S. 783 (1937). Other arguments asserted for the adoption of such rules include their favorable effect upon the interstate mobility of judges and practitioners, and the belief by the bar that uniformity will lead to a better and more predictable administration of justice. *See* Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 622, 644-47 (1936); Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 358-59 (1969). *But see* Leach, *State Law of Evidence in the Federal Courts*, 43 HARV. L. REV. 554, 582 (1930) (uniformity may result in different decisions on the merits in the state and federal courts). On rulemaking by the courts, see generally J.B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURE (1972).

[24] Although the federal court system is only one of more than 50 court systems in the United States, each with its own procedural system, the pervasiveness of the federal court system brings lawyers from every state into contact with the federal rules. *See* Cox & Newbern, *New Civil Procedure: The Court that Came in from the Code*, 33 ARK. L. REV. 1, 1-3 (1979). Moreover, approximately 23 states have adopted those rules, with some adjustments for each state's own individual needs. *Id.* at 2 n.3; *see, e.g.*, ALA. R. CIV. P. (1975 & Supp. 1982); ALASKA R. CIV. P. (1980); ARIZ. R. CIV. P. (1978); COLO. R. CIV. P. (1981); DEL. CT. R. tit. 10 (1975 & Supp. 1980); IDAHO R. CIV. P. (1979 & Supp. 1982); IND. CODE tit. 34 (1976); KAN. STAT. ANN. § 60-201 to -269 (1976); KY. R. CIV. P. (1970 & Supp. 1982); ME. REV. STAT. ANN. tit. 14 (1980); MASS. R. CIV. P. (1978 & Supp. 1982); MINN. CT. R. 48, 50 (1979 & Supp. 1982); NEV. R. CIV. P. (1981); N.M. R. CIV. P. (1982); N.D. R. CIV. P. (1974 & Supp. 1981); OHIO R. CIV. P. (1971 & Supp. 1978); R.I. R. CIV. P. (1970 & Supp. 1981); S.D. CODIFIED LAWS ANN. § 15 (1967 & Supp. 1982); TENN. R. CIV. P. (1981); UTAH R. CIV. P. (1977 & Supp. 1981); VT. R. CIV. P. (1982); W. VA. R. CIV. P. (1978 & Supp. 1982). For a comparison

York, federal practice is noticeably different from state practice.[25]

A number of factors, if present, reduce this divergence. Adoption of rules of evidence based upon the federal rules limits the intersystem discrepancies and, thus, lowers the strain on lawyers operating in both sets of courts.[26] In some instances, federal prac-

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of the Federal Rules of Evidence with the rules of individual states, see 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 101[02] (1982); Weinstein, Gleit & Kay, *Procedures for Obtaining Information Before Trial*, 35 TEX. L. REV. 481, 484-518 (1957).

[25] Under Rule 201(d) of the Federal Rules of Evidence, a judge is required to take judicial notice of adjudicative facts upon request of a party, where the necessary information has been furnished to him. FED. R. EVID. 201(d); *see* 4 L. FRUMER & E. BISKIND, BENDER'S NEW YORK EVIDENCE § 174.01[3], at 99 (1981). Under New York law, however, it appears to be within the court's discretion as to whether to take judicial notice of a fact. *See* Hunter v. New York, Ontario & W. R.R., 116 N.Y. 615, 621, 23 N.E. 9, 10 (1889); 4 L. FRUMER & E. BISKIND, *supra*, § 174.01[3], at 99. Moreover, in New York, the so-called "best evidence rule," which requires a party to present "the original instrument or explain to the court's satisfaction why he cannot do so," concerns only evidence in writing. 4 L. FRUMER & E. BISKIND, *supra*, § 270, at 652. The federal rules have expanded the application of the "best evidence rule" to include recordings and photographs as well. FED. R. EVID. 1001; 4 L. FRUMER & E. BISKIND, *supra*, § 280.02, at 713-14. When the original is lost or unobtainable and secondary evidence is admissible, the federal rule recognizes no scheme of preference or "degrees" of secondary evidence. FED. R. EVID. 1004 advisory committee note; 4 L. FRUMER & E. BISKIND, *supra*, § 280.04, at 715. Apparently, however, the New York courts sometimes make such a distinction. *See* 4 L. FRUMER & E. BISKIND, *supra*, § 280.04, at 715. Differences also exist between the Federal Rules of Evidence and those sections of the New York Civil Practice Law and Rules that pertain to evidence. For example, the federal rules contain more stringent restrictions on the impeachment of testimony by evidence showing a prior conviction of a crime. *Compare* FED. R. EVID. 609(a) *with* N.Y. CIV. PRAC. LAW § 4513 (McKinney 1963). Similarly, while the New York statute requires that prior inconsistent statements sufficient to impeach a witness' testimony be in writing subscribed to by the witness or made under oath, N.Y. CIV. PRAC. LAW § 4514 (McKinney 1963), the federal rules allow impeachment by such statements "whether written or not," FED. R. EVID. 613(a).

[26] A Proposed Code of Evidence has been drafted by the Law Revision Commission, *see* N.Y. PROPOSED CODE OF EVID. (1980) [hereinafter cited as PROPOSED CODE], pursuant to the New York State Bar Association's petition to the legislature in 1973. The Law Revision Commission described the effect of the proposed code as substituting "a clear, authoritative, systematic statement of the law of evidence for the present unsatisfactory state of the law." Memorandum of the Law Revision Commission Relating to the Codification and Revision of the Law of Evidence, [1982] N.Y. LAW REV. COMM'N REP. 29 *reprinted in* N.Y. LAW REV. COMM'N, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK, at XVII (1982).

A primary concern during the revision process was that the proposed code should conform, as much as possible, with the Federal Rules of Evidence, since "lawyers should function under the same rules of evidence regardless of whether they practice in state or federal court." Meyer and Farrell, *The New York Proposed Code of Evidence: Some Background and Some Suggestions*, 47 BROOKLYN L. REV. 1237, 1238 (1981). But while the original premise was to base the New York code on the Federal Rules of Evidence, the New York code differs from the federal rules in several respects, including treatment of preliminary questions, presumptions, and privileges. *See generally* Martin, *Code of Evidence*, N.Y.L.J., May 14, 1982, at 1, col. 1. While the New York legislature currently is treating the bill as a study bill, legislative action is expected to begin in the 1983 session. *See id.* at 2, col. 1.

tice explicitly incorporates state procedure, as in the use of state postjudgment enforcement devices[27] or in the reliance upon state long-arm jurisdiction.[28] Some further differences can be eliminated. The Eastern District of New York, for example, recently adopted a local rule on enforceability of judgments which is designed to bring its practices into conformity with state practice.[29] Moreover, within each court system, much can be done to avoid unnecessary discrepancies. For example, the Southern and Eastern Districts of New York should have uniform local rules. Additionally, wide divergences between the practices of individual judges in both state and federal courts confuse the bar and should be reduced.

Despite the differences in the two judicial systems, it should be remembered that both courts live in the same jurisprudential milieu. Their lawyers and judges are trained together at law school, have a common legal history, and share the same social, political and economic preconceptions. Looked at from abroad, there is probably less difference between the federal district court and the New York State Supreme Court than there is among New York's Surrogate's, Supreme, and Family Courts. There is also a common tendency in local federal practice, infrequently memorialized, to follow local state practice.[30]

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[27] *See* Fed. R. Civ. P. 69(a). Rule 69(a) requires that "[t]he procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held . . . . " *Id.* It was believed that developing a set of uniform rules regarding supplementary proceedings would be impractical in view of the diversity of situations encountered in the various states. *See* 7 J. Moore, *supra* note 21, ¶ 69.03[2]. Moreover, the provisions in most states regarding supplementary proceedings were considered to be "fairly adequate." *Id.* It should be noted, however, that any applicable federal statute controls. Fed. R. Civ. P. 69(a); *see* 7 J. Moore, *supra* note 21, ¶ 69.04[3]. There are few such applicable statutes. *Id.*

[28] *See* Fed. R. Civ. P. 4(e). Rule 4(e) states:

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the [state] statute or rule.

Id.

[29] Section 5020 of the New York Civil Practice Law and Rules reads in pertinent part: "Within ten years after the entry of a judgment the attorney of record or the attorney named on the docket for the judgment creditor may execute a satisfaction-piece." N.Y. Civ. Prac. R. 5020(b) (McKinney 1981). The federal district court for the Eastern District of New York has adopted a local rule substantially similar to the rule for the New York state courts. *See* E.D.N.Y.R. 15. That rule provides that "[s]atisfaction of a money judgment . . . shall be entered by the clerk . . . upon the filing of a satisfaction-piece executed . . . if within ten years of the entry of the judgment or decree." *Id.*

Assuming that both systems continue to operate in much their present form, the question of how the state and federal judiciary can ameliorate some of the stresses attendant on this multiple operation remains to be answered. One innovation, the organization of state-federal councils,[31] blossomed after Chief Justice Burger suggested their employment as a method of reducing the tension created in part by increased federal constitutional safeguards that affected state judicial and criminal procedures.[32] The majority of states organized such councils, comprised primarily of state and federal judges.[83] Unfortunately, most of the councils soon became dormant.[84]

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[30] The consistency of local state and federal practice has been referred to as "local legal culture." Letter from Director A. Leo Levin to Honorable Jack B. Weinstein (April 27, 1982). An example of informal inventiveness in coordinating state and federal practice may be seen in the endeavors of the Federal Probation Service, the Federal Bureau of Prisons, and the Federal Parole Commission to cooperate with state authorities on matters of probation and parole. Letter from Chief U.S. Probation Officer James F. Haran to Honorable Jack B. Weinstein (April 27, 1982) (describing the 20 year-old agency policy to conserve limited resources and avoid unnecessary duplication by sharing information and services for clients subject to both jurisdictions).

[31] The concept of the state-federal judicial council emerged from the movement in the 1960's and 1970's toward innovation and reform of the process of judicial administration. *See* Winkle, *Toward Intersystem Harmony: State-Federal Judicial Councils*, 6 Just. Sys. J. 240, 241 (1981); *infra* note 32. It was believed that small groups of federal and state judges could work together to alleviate tensions and to foster cooperation between the two court systems. *See* Winkle, *supra*, at 241. Although the councils are composed almost entirely of federal and state judges, *id.* at 244, attorneys and other nonjudicial personnel are sometimes represented as well, *id.* at 245; *see infra* note 33.

Since the authority of the councils is not prescribed by statute or constitution, the individual councils have flexibility in deciding their own course of action. *See* Winkle, *supra*, at 246-47. The objectives of one such council are:

> [T]o improve and expedite the administration of justice between state and federal courts . . . , to promote and harmonize the relationship between these courts and to eliminate or minimize any conflicts which may have or could develop from the operation of the dual system of courts.

Minutes of the Meeting of the Delaware Federal-State Judicial Council, Feb. 23, 1971, *reprinted in* Winkle, *supra*, at 246. Among the issues commonly addressed by such councils are jurisdictional matters such as habeas corpus applications and diversity litigation, and administrative issues such as calendar conflicts and jury selection. *See* Winkle, *supra*, at 247. *See generally infra* notes 38-86 and accompanying text.

[32] In 1970, Chief Justice Burger urged the creation of a state-federal judicial council to help alleviate the inherent tensions of a bifurcated court system. *See* Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A. J. 1049 (1972). As of 1972, 35 states had created these councils in accordance with the Chief Justice's suggestion. Winkle, *supra* note 31, at 242 n.3. Chief Justice Burger was acutely aware of the "complex concurrency" contributing to the confusion and redundancy characteristic of federalism. *See* Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639, 646, 649 (1981). Through the establishment of federal-state judicial councils, the Chief Justice hoped to foster intersystem cooperation and promote public confidence in the judiciary. *See generally* Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 U. Miami L. Rev.

The reason for this rapid rise and fall may have been that too much was expected of these councils.[85] After all, they had no independent power to act, but merely could advise the two judicial systems with respect to modifications of practice, training and possible legislative or rule changes. Moreover, there was, and should be, no limitation of constitutional protections simply because a judge's feelings may be hurt when a writ of habeas corpus or a civil rights judgment is critical of judicial, executive or legislative decisions that violate a petitioner's or plaintiff's rights. Limiting substantive and procedural rights is not within the jurisdiction of state-federal judicial councils. Nevertheless, the councils were useful in bringing judges and other judicial personnel together to discuss mutual problems and thereby avoid unnecessary misunderstandings and conflicts. A more modest and realistic view of their function may well lead to their increased viability.

Within the Second Circuit, there has been a resurgence of these judicial councils. One in Connecticut recently has begun to meet regularly,[86] and the council in Vermont has been active.[87] In New York, Chief Judge Wilfred Feinberg, acting for the Second Circuit, and Chief Judge Lawrence Cooke, acting for New York, recently have agreed to set up a council of judges to discuss state-federal justice administration problems. Following the recommen-

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175, 215-16 (1980).

[83] From 1970 to 1979, 92 percent of the members of federal-state councils were judges. Winkle, *supra* note 31, at 244. Only nine councils have included nonjudicial personnel at any time, and presently, only Mississippi, Missouri and Washington number court administrators, consultants, law professors or other nonjudicial members in their councils. *Id.* at 245.

[84] Though at least 30 councils had been established by 1972, no more than nine remained active by 1980. *Id.* at 242.

[85] While there is no definitive study on why the councils fell dormant, some hypotheses include the councils' lack of clout with policymakers, little or no financing, unsustained leadership, and incorrect judicial perception of the nature and scope of federalism problems. *Id.* at 249-51; *see* Wheeler & Jackson, *Judicial Councils and Policy Planning: Continuous Study and Discontinuous Institutions*, 2 JUST. SYS. J. 121 (1976). As of 1980, 70 percent of the inactive state-federal judicial councils reported that they discontinued meeting because no significant problems remained. Winkle, *supra* note 31, at 250 n.15.

[86] The Connecticut council was classified by one commentator as dormant in 1979. Winkle, *supra* note 31, at 243.

[87] "The Vermont Council has gained the exchange of calendars with priorities set on the basis of the type of case involved." *Id.* at 247-48.

dations of a committee of two state and two federal judges, they have made the necessary appointments.[38]

In view of the reorganization of the New York State-Federal Council, it seems appropriate to reconsider a number of areas in which judicial initiative respecting cooperation is particularly desirable. The subject is necessarily amorphous, but, nevertheless, based upon experience in New York and elsewhere, it is suggested that the following topics may provide a fruitful partial agenda for a state-federal council.

JURISDICTION

Questions involving joint federal-state jurisdiction seem to be a fertile area for judicial cooperation. For example, in many federal civil cases, related actions have been brought in state court. Every effort must be made to prevent duplication of motions, discovery and trials with their concomitant unnecessary burdens on both court systems as well as on lawyers and litigants.[39] If the individual calendar systems[40] were utilized in state court, a judge of either system could call the other, and, using a conference call in which both lawyers could participate, decide which court would abstain. Moreover, legislation may facilitate transfers of parties or segments of the litigation from one system to the other, since abstention,[41] stays,[42] and conditional dismissals[43] are not always sufficient. It is difficult to imagine a constitutional objection to such a rational cooperative system. Since it is acceptable to transfer a case from a federal court in Maine to one in Nebraska on the ground of convenience,[44] it seems no less acceptable to transfer a case from federal court to state court for trial and final disposition if the state court consents. Under commerce clause concepts, federal legislation enabling such transfers appears valid.[45]

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[38] In New York, a federal-state judicial council was established in the early 1970's; its last known meeting, however, was in 1974. N.Y.L.J., July 1, 1982, at 1, col. 4. Recently, the council, comprised of six new members, has been reactivated by Chief Judges Feinberg and Cooke. *Id.* The six judges are evenly divided between state and federal courts; they hope for an "exchange of views on matters of mutual interest." *Id.* Organizational meetings to discuss the number of members, their terms of office, the method of selecting a chairman, and the goals of the council have been called. *See* Report from Judge Hugh R. Jones to Chief Judges Feinberg and Cooke, Re Proposed State-Federal Judicial Council (Feb. 1982). The judges comprising the New York federal-state judicial council are the Honorable Sol Wachtler of the New York Court of Appeals, Honorable Vito Titone of the Appellate Division, Second Department, Honorable Martin Evans of the Supreme Court of New York County, Honorable Ellsworth Van Graafeiland and Honorable Richard Cardamone of the United States Court of Appeals for the Second Circuit, and Chief Judge Jack Weinstein of the United States District Court for the Eastern District of New York. N.Y.L.J., July 1, 1982, at 1, col. 4. *See generally* Wheeler & Jackson, *supra* note 35, at 121.

[39] The particularly vexing phenomenon of duplication in the state and federal courts was described by one commentator as "diachronic redundancy." *See* Cover, *supra* note 32, at 646-49. This problem occurs when the same issues, and especially the same facts, are decided by state and federal courts in sequence. *Id.*; *see also* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (habeas corpus); Mitchum v. Foster, 407 U.S. 225 (1972) (describing relationship between comity, federalism, and civil rights). *See generally* Francis v. Henderson, 425 U.S. 536, 549 (1976); Ray v. Noia, 372 U.S. 391, 414-21, 426-35 (1963); Darr v. Burford, 339 U.S. 200, 204-10 (1950).

[40] *See infra* notes 51-52 and accompanying text.

Federal-state judicial councils also might focus upon any possible jurisdictional changes in the offing. Any sudden shift in jurisdiction, procedure or relative congestion in either system may impose a sudden and unmanageable burden on the other. Should federal diversity jurisdiction be abolished,[46] for instance, it would probably be necessary to add at least four New York Supreme Court Justices and the equivalent of one Appellate Division Justice, given the high proportion of intermediate appeals in the complex cases that would be shifted.[47] In any event, if federal jurisdiction is reduced, state courts would require assistance in predicting the effects on state dockets. The federal judiciary should be able to analyze their caseloads and provide the necessary data with reasonable accuracy.

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[41] The doctrine of abstention, as enunciated in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), is that federal courts will defer to state courts in cases containing unclear issues of state law whose resolution could avoid or substantially modify a federal constitutional question. *Id.* at 501. One commentator has noted that this may engender unnecessary delay and that the costs of the *Pullman* procedure outweigh its benefits, eliminating or at least diminishing the applicability of the doctrine. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 698 (1981); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1153-63 (1974); *see* Anti-Injunction Act, 28 U.S.C. § 2283 (1976) (prohibiting federal injunctions against state proceedings when state action is pending).

[42] In cases of concurrent jurisdiction, a stay of federal proceedings is favored by virtue of two policy considerations, namely, avoidance of waste and the impropriety of a race to secure res judicata effect. Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684, 698 (1960); *see* Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978, 979-80 (1950) (stays are customarily ordered on grounds of comity and are to be favored).

[43] Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that a dismissal may be permitted by the court "upon such terms and conditions as the court deems proper." FED. R. CIV. P. 41(a)(2). A court may also attach a condition to an involuntary dismissal granted under a Rule 41(b) motion. *See* Himalayan Indus. v. Gibson Mfg. Co., 434 F.2d 403, 404-05 (9th Cir. 1970); 5 J. MOORE, *supra* note 21, ¶ 41.14[1] n.8.

[44] *See* 28 U.S.C. § 1404(a) (1976).

[45] Article I, section 8 of the Constitution provides: "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3. *See generally* W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL LAW 93-154 (1980). This power to legislate has been broadly construed. As early as 1942, the Supreme Court indicated that any activity "though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." Wickard v. Filburn, 317 U.S. 111, 125 (1942); *see, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276-77 (1981); Perez v. United States, 402 U.S. 146, 153 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 248, 255 (1964). It is submitted that transfer of pending litigation could have at least some interstate ramifications, and so be amenable to congressional control.

Finally, a number of states have adopted the uniform statute permitting certification of state law questions by the federal courts.[48] While this is primarily a diversity jurisdiction problem, it also arises in federal question cases.[49] A reverse procedure permitting state tribunals to call upon federal courts for advice certainly would be useful, and does not seem to be doomed by constitutional objections to advisory opinions[50] since a real controversy would be pending in state court.

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[46] Several recent proposals have been made to abolish or substantially reduce federal jurisdiction on the basis of diversity of citizenship. *See, e.g.*, American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 9-22 (1969); Burger, *Chief Justice Burger's 1977 Report to the American Bar Association*, 63 A.B.A. J. 504, 506-07 (1977). In making such recommendations, the commentators have noted that the traditional justifications offered for diversity of citizenship jurisdiction, such as the fact that out-of-state parties might encounter discriminatory treatment in state courts, are no longer warranted. *See* H.J. Friendly, Federal Jurisdiction: A General View 147-48 (1973); Burger, *supra*, at 506; Flango & Blair, *The Relative Impact of Diversity Cases on State Trial Courts*, 2 St. Ct. J. 20, 20 (Summer 1978).

The primary reason for transferring diversity cases to state courts is to reduce the ever-increasing federal caseload. Flango & Blair, *supra*, at 20. It is believed that the additional cases would be less of a burden on the state courts, since they would be spread over a wider judicial base. *See* Burger, *supra*, at 506; Flango & Blair, *supra*, at 21. The effect of such a distribution would, of course, vary from state to state. Flango & Blair, *supra*, at 23. As yet, however, no decision has been made on the subject, although Congress is studying the proposed legislation. *See Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 109-14 (1982) (statement of Robert J. Sheran, Chief Justice, Supreme Court of Minnesota).

[47] A recent study conducted by the National Center for State Courts indicates that the abolition of federal diversity jurisdiction and the resulting transfer of cases from the federal to state court system would not affect all states equally but would impose a disproportionate hardship on some states, specifically Georgia, Kansas, Massachusetts, Minnesota, Mississippi, New York, Rhode Island, South Carolina, and Wyoming. In general, however, the survey's findings indicate that while the transfer of the cases would add significantly to the burden of these state courts, which were found to be already overburdened, these cases "could be handled in most instances without major additions to state judicial resources." Flango & Blair, *supra* note 46, at 24 (quoting Minnesota Chief Justice Robert J. Sheran, 1976-77 Minn. St. Ct. Rep. 12).

[48] The Supreme Court, in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), held that federal courts exercising diversity jurisdiction are required to apply state substantive law rather than federal "general" common law. *Id.* at 78. To assist the federal courts in ascertaining the pertinent state law, some states allow the use of the certified question. "The certifying federal court sends to the state's highest court the question to be answered. The question is considered and the answer is given." Unif. Certif. Ques. Law Act, 12 U.L.A. 49-50 com-

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missioner's prefatory note (1975). The first state to provide for such certification was Florida. *Id.* at 50; *see* Fla. Stat. Ann. § 25.031 (West 1974). Section 1 of the Uniform Act does not mandate the highest court of the state to answer certified questions. Unif. Certif. Ques. Law Act § 1, 12 U.L.A. 52 commissioner's comment (1975); *see* NLRB v. White Swan, 313 U.S. 23, 27 (1941); Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 571 (1939).

[49] Federal subject matter jurisdiction is based upon a showing of either diversity of citizenship or the existence of a substantial federal question. 28 U.S.C. §§ 1331, 1332 (1976 & Supp. IV 1980). Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (Supp. IV 1980). Such cases are normally characterized as those involving substantial federal questions. *See* C. Wright, *supra* note 1, § 17. Jurisdiction based on a federal question may arise over questions regarding the Constitution, a particular federal statute or regulation, or a treaty. *Id.*

Section 1332 confers original jurisdiction on the district courts in actions involving controversies between, *inter alia*, citizens of different states, or citizens of a state and citizens of a foreign state. *See* 28 U.S.C. § 1332(a)(1)-(2) (1976). Such jurisdiction is limited to disputes involving a requisite jurisdictional amount. *Id.* § 1332(a). One justification long offered for the existence of diversity of citizenship jurisdiction is that out-of-state parties might face prejudicial treatment in the courts of another state. *See* C. Wright, *supra* note 1, § 23, at 85. Recently, however, commentators have proposed an abolition of diversity of citizenship jurisdiction. *See supra* note 46.

[50] "[T]he oldest and most consistent thread in the federal law of justiciability is that federal courts do not give advisory opinions . . . ." C. Wright, *supra* note 1, § 12, at 40. The Supreme Court has noted that "[a]s far back as *Marbury v. Madison*, this Court held that judicial power may be exercised only in a case properly before it—a 'case or controversy' . . . not then moot or calling for an advisory opinion." United States v. Richardson, 418 U.S. 166, 171 (1974) (citation omitted).

The jurisdiction of the federal courts is defined in article III of the United States Constitution, which limits the federal judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Chief Justice Warren stated:

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 94-95 (1968). No justiciable controversy is presented when the parties to an action are asking for an advisory opinion. *Id.* at 95; *see* United States v. Fruehauf, 365 U.S. 146, 157 (1961); Parker v. County of Los Angeles, 338 U.S. 327, 330 (1949); Muskrat v. United States, 219 U.S. 346, 361 (1911).

SHARING ATTORNEYS

Lawyers quite frequently find themselves scheduled to appear in federal and state courts at the same time. Generally, the federal courts, with their individual calendar systems,[51] can offer firmer trial dates than state courts. Usually, therefore, state judges working under a general calendar system[52] have graciously allowed lawyers to meet these fixed dates, particularly when the federal trial involves multiple parties or out-of-state attorneys. Often, however, the reverse is true. When a federal judge receives a call from a state judge, particularly in a long-delayed criminal case, asking that a lawyer be released, every effort generally will be made to do so. The difficulty with conflicting schedules thus is resolved through the concern for each other's effectiveness that is shared by most judges and lawyers.

Respect between state and federal judges, and for the trial bar, does much to ameliorate what would otherwise be an impossible situation. Yet, the problems could be exacerbated as crowded dockets deter judges from exercising discretion to grant adjournments.[53] Moreover, currently proposed individual calendar systems for state judges,[84] designed to increase both the quality and quantity of dispositions, arguably will increase schedule conflicts as well.[85] In effect, hundreds of state and federal judges would be setting trials calling on the services of a limited trial bar. Working out reasonable solutions for such impasses should be a primary goal for federal-state judicial councils.

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[51] There are two systems currently employed by the courts to allocate cases among various judges. The state courts primarily use a general or master calendar system, *see infra* note 52, while the larger federal courts generally use what is known as an individual calendar system. Under the individual calendar system, a case randomly is assigned to a judge at the time of filing. The judge to whom the assignment is made will then be responsible for the case until its final disposition. *See* Committee on Criminal Advocacy, *The Individual Calendar System—A Needed Reform for the New York City Criminal Court*, 37 Rec. A.B. City N.Y. 2, 5 (1982). "Individual calendar control by federal district court judges appears to be a key factor in assuring productive use of court time and the prompt trial or other disposition of criminal cases." *Id.* at 7 (quoting Fooner, *Where the System Breaks Down*, in Blow the Whistle on Crime 121 (W. Seymour, Jr., ed. 1979)).

[52] The New York City Criminal Court provides an example of what is known as a general or master calendar system. Presently in New York, cases are assigned to calendar parts, such as arraignment or trial parts. When further action is required, the case is reassigned to the appropriate part. As a case shifts parts, it also changes judges, thus no single judge will oversee any given case from beginning to end. *See* Committee on Criminal Advocacy, *supra* note 51, at 2-3. This system frequently is faulted for its absence of focused responsibility, for the "cases belong to the part, not the judge . . . . " *Id.* at 3. "In addition, judges are constantly called upon to make snap decisions about unfamiliar cases, which [are] then passed on to new judges who are equally unfamiliar with the history of the cases." *Id.* Moreover, at least one commentator has suggested that current delays in civil trials may be substantially reduced by substituting an individual calendar system for present master systems. T. Church, Justice Delayed 73 (1978).

[53] The volume of litigation pending in the courts has exploded over the past decades. *See* Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982). For example, in the period from 1940 to 1981, the number of civil case filings in the federal district courts rose

Another area in which both the federal and state systems compete for the same trial advocates is pro bono voluntarism. In the Eastern District of New York, a great deal of effort has been devoted to developing pro bono panels in civil cases.[86] Some method

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from approximately 35,000 to 180,000 annually, resulting in a doubling of the yearly caseload per judge, from 190 to 350 cases. *Id.* at 275. Similarly, filings in the state trial courts from 1967 to 1976 increased at approximately double the rate of population growth. *Id.*

[84] *See supra* notes 51-52.

[85] Taking issue with the notion that individual calendar systems promote schedule conflicts, proponents of the individual calendar approach argue that under the general calendar system, schedule conflicts are already numerous, suggesting that scheduling problems are not really linked to any particular case assignment system. Committee on Criminal Advocacy, *supra* note 51, at 12. Moreover, supporters of the individual system suggest:

> [C]ommon sense tells us that schedules conflict when the parties involved have failed to communicate with each other about their available time. Indeed, under the master calendar system, there is far less incentive to avoid schedule conflicts and adjournments since it is commonplace that the judge who agreed to an initial schedule is not the judge who is asked for an adjournment. In an individual calendar system, an attitude of date certain scheduling would prevail, providing the impetus for fewer calendar appearances and for better communication between judges and attorneys as well as the police and other witnesses.

Id.

[86] The Eastern District Civil Litigation Fund, Inc., was established in 1982 to support the training and litigation expenses of volunteer attorneys assisting otherwise pro se parties in civil matters concerning such issues as social security benefits, employment, discrimination, and civil rights actions under 42 U.S.C. § 1983. *See generally* Board of Judges of the United States District Court for the Eastern District of New York, Rules Governing Procedures for Appointment of Attorneys in Civil Actions (1982). The fund oversees the assignment of counsel in these civil cases and sponsors topical training seminars for participating attorneys. Eastern District of New York Civil Litigation Fund, Inc., Handbook on the Representation of Indigent Litigants in Section 1983 Civil Rights Actions: An Introduction to Practice (1982); Eastern District of New York Civil Litigation Fund, Inc., Social Security Disability Appeals Conference (May 6, 1982).

While the Supreme Court has announced a constitutional right to counsel in criminal prosecutions, *see, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 26 (1972); Gideon v. Wainwright, 372 U.S. 335, 340 (1963), an indigent litigant in a civil case is not usually similarly provided with legal assistance, *see, e.g.*, Haines v. United States, 453 F.2d 233, 237-38 (3d Cir. 1971); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971); Ehrlich v. Van Epps, 428 F.2d 363, 364 (7th Cir. 1970). In a number of cases, however, courts, in their discretion, have appointed counsel for indigent civil litigants. *See, e.g.*, Massengale v. Commissioner, 408 F.2d 1373, 1374 (4th Cir.), *cert. denied*, 396 U.S. 923 (1969) (income tax case); Jacox v. Jacox, 43 App. Div. 2d 716, 717, 350 N.Y.S.2d 435, 436 (2d Dep't 1974) (matrimonial action).

of sharing this valuable resource, as well as the criminal defense bars created by the Criminal Justice Act[87] and Article 18-B of the New York County Law,[88] is therefore necessary.

JUDICIAL ADMINISTRATION

Another area to be considered is the possibility of reducing administrative difficulties via maximum federal-state cooperation. The federal record system is in the process of being computerized, and similar action will be undertaken by New York State.[89] This

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A number of commentators have argued that the assignment of counsel to indigent civil litigants, though not constitutionally guaranteed, is both beneficial and necessary. *See, e.g.*, Botein, *Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without a Judicial Remedy?*, 36 Brooklyn L. Rev. 368, 368-70 (1970); O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 1, 16-17 (1967); Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 Val. U.L. Rev. 21, 53-54 (1967); Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 Conn. L. Rev. 651, 658 (1981); Weinstein, *Cost-Cutting and Streamlining May Deny Justice to the Poor*, N.Y.L.J., Mar. 30, 1981, at 1, col. 2. It has been proposed that the pro bono work of private practitioners be extended on a compulsory basis. Model Rules of Professional Conduct Rule 6.1 (Proposed Final Draft 1981). Rule 6.1 of the Proposed Model Rules of Professional Conduct provides:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, or by service in activities for improving the law, the legal system or the legal profession.

Id. See generally Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 Cardozo L. Rev. 255 (1981); Note, *Court Appointment for Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 Colum. L. Rev. 366, 367-72 (1981).

[87] 18 U.S.C. § 3006A (1976). The Criminal Justice Act provides, *inter alia*, that each United States district court shall place in operation a plan for furnishing representation for indigents charged with certain designated offenses. *Id.* Representation under the Act includes counsel as well as investigative, expert, and other services necessary for an adequate defense. *Id.*; *see, e.g.*, United States v. Henderson, 525 F.2d 247, 251 (5th Cir. 1975) (Criminal Justice Act reflects strong policy to furnish counsel and services to indigents so as to place such defendants in nearly equal position with defendant who can pay); Tyler v. Lark, 472 F.2d 1077, 1079-80 (8th Cir.) (purpose of statute is to protect indigent defendants), *cert. denied*, Beilenson v. Treasurer of the United States, 414 U.S. 864 (1973); United States v. Tate, 419 F.2d 131, 132-33 (6th Cir. 1969) (government compelled under statute to provide psychiatric evaluation for indigent contemplating defense of temporary insanity).

[88] Article 18-B of the New York County Law provides in part:

> The board of supervisors of each county and the governing body of the city in which the county is wholly contained shall place in operation . . . a plan for providing counsel to persons charged with a crime . . . who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense.

N.Y. County Law § 722 (McKinney 1972 & Supp. 1982).

[89] *See generally* Nihan & Wheeler, *Using Technology to Improve the Administration*

should permit swift interchange of all criminal and civil information. It would be helpful if, for example, a judge, state or federal, could quickly ascertain the number of cases of a specific type brought by a particular plaintiff, or in which a certain attorney is serving as counsel, or the length of an average sentence for a given crime. Storing such information in computerized data banks would greatly facilitate access to it and would enable a prompt search of all federal and state records.

Bar membership and discipline provide another area of state-federal interface. Separate requirements for admission to state and federal bars are unnecessary since admission to the bar is essentially a state matter.[60] A full and appropriate bar examination is given by the state, and law school courses should be designed to enable students to act effectively in both systems. In addition, discipline is, for the most part, a state matter. In virtually no instance will a lawyer be excluded from the federal court and not the state system. Since the state has a comprehensive admission and disciplinary system, it is common practice to issue an order to show cause why a lawyer should not be disciplined by the federal court when he or she was disciplined by the state and, except in a few cases where the state decision is being challenged, to order the same discipline concurrently. If a lawyer acts improperly in the federal court, absent a contempt citation or other sanction under the federal rules,[61] any delict should be handled by the state. Rather than strike an attorney from the federal rolls, the problem should be brought to the attention of the state authorities, leaving to them the primary disciplinary function.

Recent federal attempts to design a wholly new federal admissions and disciplinary system, it is submitted, have been misguided

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of Justice in the Federal Courts, 1981 B.Y.U. L. REV. 659, 665.

> Technology has three general uses in the courts. First, it can provide management and operational support, enabling courts to deal better with the increased size and complexity of their caseloads. Second, it can speed the execution of routine tasks and increase the amount of useful information available to a court. Finally, it can help courts accomplish the research and planning tasks necessary for the proper administration of justice.

Id. at 661; *see* Higginbotham, *The Trial Backlog and Computer Analysis*, 44 F.R.D. 104, 106-10 (1968) (discussion of advantages of computer use in court systems); Whittaker & McDermott, *Computer Technology in an Appellate Court*, 54 JUDICATURE 73, 73 (1970) (feasibility of a court of appeals using a computer to increase efficiency).

[60] *In re* Abrams, 521 F.2d 1094, 1105 (3d Cir.) (Rosenn, J., concurring), *cert. denied*, 423 U.S. 1038 (1975).

[61] *See, e.g.*, FED. R. CIV. P. 11.

as a matter of policy.[62] Judicial activity for its own sake is particularly undesirable in light of the scarcity of judicial resources within both systems. Duplication of state efforts should be avoided as much as possible.

Another administrative factor deserving attention is jury selection. The time lost in New York state criminal trials because of the virtually unrestrained use of voir dire[63] by lawyers is well known.[64] The trial bar strongly has resisted the federal system of questioning by the judge using inquiries suggested by counsel.[65] Here, as in other areas, the federal and state trial judges can learn techniques from each other, modifying them as differences in practice require. For example, some federal judges are currently using magistrates or law clerks to supervise the jury voir dire while the judge handles other cases. Some state judges have allowed the lawyers to select civil juries without a judge being present. These ideas merit further joint evaluation, and participation in each other's training programs could prove useful.[66]

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[62] In 1975, a recommendation was made by the Judicial Council of the Second Circuit that the Second Circuit district courts adopt rules designed to increase the difficulty of admissions to the federal bar and to improve disciplinary procedure. *See* Advisory Committee on Proposed Rules for Admission to Practice, *Final Report*, 67 F.R.D. 161, 161, 191 (1975). Some of the proposed rules included an increase in required law school courses and an evaluation before a screening committee on admissions. *See id.* at 167-72. It has been suggested that such a policy amounts to an unjustified interference with the law school curriculum and is based on an unreasonable assumption that attorneys in the state courts are less qualified than those in the federal courts. Weinstein, *Proper and Improper Interactions Between Bench and Law School: Law Student Practice, Law Student Clerkships, and Rules For Admission to the Federal Bar*, 50 ST. JOHN'S L. REV. 441, 451, 457 (1976).

[63] The National Center for State Courts defines voir dire as "the process by which prospective jurors are examined to determine their suitability to serve on the case at hand. Its purpose is to uncover prejudices and reveal biases, in the hope that all jurors will be fair and impartial in judging the defendant." NAT'L CENTER FOR STATE COURTS, FACETS OF THE JURY SYSTEM 22 (1976).

[64] *See* Costantino, *Abolish Lawyers' Voir Dire of Juries*, 8 LITIGATION 5, 6 (Spring 1982). Judge Costantino of the Eastern District of New York stated:

> The state courts consume far more time in voir dire than their federal counterparts. For example, jury selection now consumes one-third of New York City court time. . . . During the recent state trial of Jean S. Harris, who was convicted of murdering Dr. Herman Tarnower, the author of *The Scarsdale Diet*, the lawyers questioned 550 possible jurors over three weeks. During those same three weeks in the U.S. District Court in Brooklyn, I selected three juries and tried a racketeering case, a narcotics case, and a longshoreman case. I managed to select a jury acceptable to both the government and the defense in one of the "Abscam" trials in three hours. . . .
>
> When lawyers rather than judges select juries it is a time-consuming and expensive procedure.

Id.

[65] Federal Rule of Civil Procedure 47(a) and Rule of Criminal Procedure 24(a) guide voir dire examination in federal court. Under these rules, the trial judge is granted broad discretion. For example, under both the civil and criminal rules, the trial court may examine the panel or permit the parties or their attorneys to conduct the examination. Costantino, *supra* note 64, at 5.

It is also apparent that the two systems do not cooperate in distributing the burden of jury service. Some federal jurors complain that they are called to serve in federal court shortly after having served in state court, and vice versa. It would be more equitable for each system to give credit for recent service in the other.[67] Further, it appears that the federal juror panels in the Eastern District, being drawn from voting rolls alone, may not be as representative of the population as they are under the state system, which uses other sources in addition to voter lists. Perhaps one data base from which to draw both federal and state jurors could be utilized, thereby saving money and minimizing juror inconvenience. Legislation may be required to achieve this result.[68]

Another facet to be considered is the utilization of expert witnesses. New York State has expert medical witness panels.[69] Yet, use of these state panels by federal judges sometimes is denied by the clerk in charge. It seems unreasonable to go to the expense of creating duplicate panels. Similarly, the increased courtroom use of statistics augurs the eventual establishment of groups of statistical experts to aid the courts.[70] Both state and federal courts should share in this resource if it is created.

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[66] The Federal Court's Circuit Conference in the fall of 1982 will be discussing jury selection and use. State judges should be welcomed and, in fact, Presiding Justice Milton Mollen of the First Department has been invited by the United States District Court for the Eastern District of New York.

[67] *See* Winkle, *supra* note 31, at 248.

[68] The process of selecting citizens who may serve as jurors in New York is regulated by the provisions of the New York Judiciary Law. *See* N.Y. JUD. LAW §§ 501-537 (McKinney 1981 & Supp. 1981-1982). The statute lists several possible sources from which the names of eligible jurors may be ascertained, including lists of utilities subscribers, motor vehicle registration lists, voter lists and tax assessment rolls. *See id.* § 506 (McKinney Supp. 1981-1982); *see also* Comment, *Challenging the Juror Selection System in New York*, 36 ALB. L. REV. 305, 311-13 (1972). The selection under the New York system is required to be performed randomly. *See* N.Y. JUD. LAW § 506 (McKinney Supp. 1981-1982).

The federal selection plan also provides for a random selection from either the voter registration lists or the lists of actual voters. *See* 28 U.S.C. § 1863 (1976). Such a system has been criticized as being less than representative of the total population. *See* J. VAN DYKE, JURY SELECTION PROCEDURES 24 (1977). The federal courts, however, repeatedly have upheld the validity of this procedure. *See* United States v. Huber, 457 F. Supp. 1221, 1231-32 (S.D.N.Y. 1978); United States v. Gaona, 445 F. Supp. 1237, 1240 (W.D. Tex. 1978).

[69] *See* N.Y. JUD. LAW § 148-a (McKinney Supp. 1981-1982). For a recent case illustrating the use of expert medical witness panels, see Virgo v. Bonavilla, 71 App. Div. 2d 1051, 420 N.Y.S.2d 804 (4th Dep't 1979), *aff'd*, 49 N.Y.2d 982, 406 N.E.2d 1059, 429 N.Y.S.2d 165 (1980).

There is one administrative issue that causes actual and potential problems but is, most likely, not susceptible of resolution by state-federal judicial councils. There are differences in the pay, ancillary benefits and duties of equivalent personnel in the state and federal systems that may cause intersystem friction. For example, federal probation service was at one time less attractive, and possibly is now more attractive, than state service. Federal and state reporters' compensation differs.[71] Although these factors may result in employee dissatisfaction or cause a shift in employment from one system to the other, negotiating wages and other terms of employment is so complicated already that perhaps this thicket should be left unexplored by state-federal judicial councils.

CRIMINAL JUSTICE

The final topic to be examined is the arena of criminal justice. A number of the problems besetting the courts in this area may be alleviated, to some extent, by increased state-federal cooperation.

There is growing pressure in this country to incarcerate increasing numbers of felons for lengthier periods of time. Presently, there are over 350,000 prison inmates in the United States.[72] In fact, we now imprison a larger percentage of our population than any other western nation.[73] The states are not building prisons rapidly enough to handle these increasing numbers.[74] In case after case, the federal courts have intervened to reduce overcrowding in state jails and prisons,[75] which, in turn, has a direct impact upon

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[70] Several commentators have noted the increased use of statistics in the courts. *See* Brilmayer & Kornhauser, *Review: Quantitative Methods and Legal Decisions*, 46 U. Chi. L. Rev. 116, 116-17 (1978); Cohn, *On the Use of Statistics in Employment Discrimination Cases*, 55 Ind. L.J. 493, 493 (1980); Curtis & Wilson, *The Use of Statistics and Statisticians in the Litigation Process*, 20 Jurimetrics J. 109, 110 (1979). Some commentators attribute this to "larger numbers of technical disputes involving problems such as air and water quality, the safety and economics of nuclear generators, the deregulation of natural gas, and the presence of carcinogenic agents in the workplace and in the kitchen." Brilmayer & Kornhauser, *supra*, at 117.

[71] As of July 12, 1982, court reporters in the federal system were receiving salaries ranging from $30,121 to $33,133. State court reporters' salaries range from $26,763 to 35,980. *See* Memorandum from Robert C. Heinamann, Chief Deputy Clerk of the Office of Court Administration to the Honorable Jack B. Weinstein, Chief Judge, United States District Court, Eastern District of New York (July 12, 1982). There are, however, differences in fees earned from transcripts and in the demands made by federal and state judges making comparisons difficult.

[72] The Bureau of Justice Statistics reported a prison population of 369,009 in this country in 1981. *Court News Roundup*, 21 Judges' J. 1, 1 (1982). This constituted a record increase of 12.1 percent in the total number of inmates in state and federal institutions. *Id.* These figures included an increase of 16 percent in the number of federal prisoners, thus ending a 3-year decline in the federal prison population. *Id.* at 46. The figures also indicate wide variations among the states in the percentage of change. The percentage ranged from a low of -0.9 percent for Michigan, the only state to show a decline in prison population over

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the period studied, to a high of + 24.8 percent for Alabama. *Full House in America's Prisons*, U.S. NEWS & WORLD REP., May 17, 1982, at 17.

[73] The American Institute of Criminal Justice has reported that our national rate of incarceration of 250 people per 100,000 is surpassed only by two industrialized nations, namely, South Africa (400 per 100,000) and the Soviet Union (391 per 100,000). Rawls, *Crises and Cutbacks Stir Fresh Concerns on Nation's Prisons*, N.Y. Times, Jan. 5, 1982, at A1, col. 1, B10, col. 1. A comparison of the incarceration rates in other western nations showed that the rate in Canada is less than one-half, in Britain less than one-third, and in West Germany less than one-quarter of the rate in the United States. *Id.* at B10, col. 2.

[74] In June, 1981, it was reported that federal and state prisons were then holding a total of 320,000 inmates. This figure exceeded the stated total prison capacity by almost 100,000. *Bulging Prisons Bracing for New Disorders*, U.S. NEWS & WORLD REP., June 8, 1981, at 31. In that same article it was reported that at least 70 new state facilities were then under construction and 100 more were in the planning stage. *Id.*

Obviously one major factor preventing the construction of new facilities is their cost. The cost of construction has been estimated to be from $30,000 to $100,000 per bed. Pear, *Reagan Panel Asks Aid to State Jails and Sterner Laws*, N.Y. Times, Aug. 18, 1981, at A1, A14, col. 1 ($70,000 for maximum security, $30,000 to $50,000 for medium security); *id.*, Apr. 23, 1982, at A26, col. 4 (letter to the Editor from Robert Gangi, Executive Director, Correctional Association of New York) ($90,000 to $100,000 estimate per bed). It has been suggested that the federal government provide financial assistance to the states for the purpose of constructing new facilities. The United States Attorney General's Task Force on Violent Crime recommended in its final report that the federal government make some $2 billion available to the states for construction of prison facilities. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME 10, 19-20 (1981) [hereinafter cited as FINAL REP.]. One of President Reagan's top advisers, Edwin Meese III, has conceded, however, that the federal government cannot afford to follow this recommendation. Rawls, *supra* note 73, at B10, col. 1.

In contrast to the Attorney General's task force, the American Bar Association's task force on crime is reported to have concluded that building new prisons will not help reduce violent crime. Lauter, *ABA Crime Unit Backs Pretrial Jail*, Nat'l L.J., Jan. 11, 1982, at 7, col. 1. "The ABA group said that building new prisons should be a low priority in most states, which should concentrate more on finding alternative ways of handling non-violent offenders." *Id.* at 7, col. 4. It has also been suggested that the basic problem is not money but rather the unwillingness of the people to accept prisons in their neighborhoods. McQuiston, *Why Jail Crowding is So Hard to Cure*, N.Y. Times, May 2, 1982, § 21, at 1. For a general discussion of the problem of prison overcrowding, see Lieber, *The American Prison: A Tinderbox*, N.Y. Times, March 8, 1981, § 6 (Magazine), at 26.

[75] At the end of 1980, a total of 28 states and the District of Columbia were ordered by federal courts to reduce the overcrowding in their correctional facilities. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1980, at 1 (1981). By the end of 1981, there were 31 states under such orders, and 37 states in litigation concerning prison conditions. *Court News Roundup*, *supra* note 72, at 1. This judicial intervention persists despite the holding of the Supreme Court that the housing of two prisoners in a single cell in an Ohio correctional facility did not constitute cruel and unusual punishment for purposes of the eighth and fourteenth

state court bail, sentencing and parole practices. The solution to this problem does not lie with state and federal judges alone. State judges and parole boards are caught between the federal judiciary's mandates to reduce overcrowding and the state legislators' failure to allocate funds. Federal army bases, old civil and conservation corps camps, and other facilities could be made available to meet the states' needs in this area, particularly when juvenile offenders are involved.[76]

When prisoners are convicted in both state and federal court, joint sentencing problems may arise. The federal judge who sentences after a state sentence is imposed can recommend to the United States Attorney General that the sentence be served in the state system, if he wishes the sentences to run concurrently.[77] He

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amendments. Rhodes v. Chapman, 452 U.S. 337, 348-49 (1981). As recently as December 23, 1981, New York State's motion for a delay of a federal judge's order to remove 550 prisoners from the Rikers Island House of Detention for Men was denied. N.Y.L.J., Dec. 23, 1981, at 1, col. 1.

[76] In its final report, the Attorney General's Task Force on Violent Crime made the following recommendation:

> The Attorney General should work with the appropriate governmental authorities to make available, as needed and where feasible, abandoned military bases for use by states and localities as correctional facilities on an interim and emergency basis only. Further, the Attorney General should work with the appropriate governmental authorities to make available, as needed and where feasible, federal property for use by states and localities as sites for correctional facilities.

FINAL REP., *supra* note 74, at 10 (footnote omitted). A recent Gallup Poll indicates that 76 percent of the American people favored the Reagan administration's proposal to permit states to use abandoned military bases to house their prisoners. N.Y. Times, Apr. 5, 1982, at A18, col. 3. The State of New Jersey already has arranged to lease the former stockade at Fort Dix from the federal government. N.Y. Times, Mar. 25, 1982, at B10, col. 3. The new facility will accommodate a total of 500 prisoners presently housed in overcrowded county jails. N.Y. Times, May 14, 1982, at B2, col. 5.

[77] Two sections of Title 18 of the United States Code have been interpreted as precluding a federal judge from ordering that a federal sentence be served concurrently with a state sentence. *See* 18 U.S.C. §§ 3568, 4082 (1976). The relevant part of section 4082(a) provides:

> A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

18 U.S.C. § 4082(a) (1976). This statute clearly gives the United States Attorney General, and not the federal judge, authority to determine where a particular sentence will be served. It has also been interpreted as indirectly denying the federal judge power to order that a federal sentence be served concurrently with a previously imposed state sentence. *See* United States v. McIntyre, 271 F. Supp. 991, 999 (S.D.N.Y. 1967), *aff'd*, 396 F.2d 859 (2d Cir. 1968), *cert. denied*, 393 U.S. 1054 (1969). The *McIntyre* court stated:

> It is fundamental law that under 18 U.S.C. § 4082 the Court has no power to order a Federal sentence to run concurrently with a prior State sentence since this in effect would be a designation of the place of confinement, a matter exclusively

cannot, however, extend the prisoner's time in the state penitentiary, nor can he designate service of both sentences in his own system. A state judge may take a prior federal sentence into account in sentencing on a state charge, but he cannot recommend service of the state sentence in a federal institution.[78] Counsel in the two cases are often different, and the defendant may not be fully and fairly treated in either. Joint sentencing by state and federal judges, perhaps after consultation with one another, sometimes would be more satisfactory. Coordination of correctional and parole decisions obviously would aid in this regard.

Another area that would profit from judicial cooperation would be probation services. When both state and federal authorities have jurisdiction over the same prisoner, the probation and parole authorities of each are called upon to perform similar tasks.[79] The two systems should share probation reports in order to

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> within the province of the Attorney General. The sentencing Court is only authorized to recommend a place of detention which the Attorney General is free to accept or reject. And while the Attorney General, in practice, generally follows the recommendation of the Court, he is under no duty to do so. Thus . . . a grant of concurrency (arising from the designation of place of sentence) is a matter of grace rather than a matter of right. It arises from the combination of the sentencing judge's recommendation and the Attorney General's adherence to that judge's suggestion.

271 F. Supp. at 999-1000 (citations omitted); *accord* United States v. Janiec, 505 F.2d 983, 987 (3d Cir. 1974) ("[a]lthough the Attorney General may 'designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise,' 18 U.S.C. § 4082(b), a federal court has no authority to designate 'a place of confinement' "), *cert. denied*, 420 U.S. 948 (1975); Joslin v. Moseley, 420 F.2d 1204, 1206 (10th Cir. 1969).

This same conclusion, that a federal judge does not have the power to order concurrency between a federal and state sentence, also has been reached on the basis of section 3568. That section provides:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. . . . No sentence shall prescribe any other method of computing the term.

18 U.S.C. § 3568 (1976). In United States v. Allen, 588 F.2d 183 (5th Cir. 1979), the court held, on the basis of this statute, that the district court had not been empowered to order that the federal sentence be served concurrently with one previously imposed by the state. *Id.* at 185.

[78] Saulsbury v. United States, 591 F.2d 1028, 1035 (5th Cir.), *cert. denied*, 444 U.S. 857 (1979).

[79] In general, a judge may place an offender on some form of probation in lieu of imposition of incarceration. *See generally Sentencing, Parole and Probation*, 70 GEO. L.J. 721, 763-70 (1981). A crucial factor in such a decision is the input received from probation services. *See* R. HENNINGSEN, PROBATION AND PAROLE 32 (1981). Aside from supervising the terms of probation, a major role of probation services is the preparation of the presentence

avoid duplication of research, since the investigative efforts of probation services in preparing background reports are costly and intrusive. There is no need to investigate and describe the same defendant twice. At the moment, the federal probation system in the Eastern District probably has more high quality resources available than the state system, and there is no reason why the state could not make greater use of the federal reports.[80] Certainly, courts and probation services could frame their orders so that each probation system could operate as agent for the other in supervision, training and charging probation violations. The Eastern District Chief Probation Officer has indicated that cooperation with state probation services already is quite advanced.[81]

A final area of federal-state interplay in the criminal justice system is federal civil review of state criminal prosecutions. State criminal defendants frequently bring collateral attacks on their criminal arrests or convictions before exhausting their state remedies. When such attacks are leveled, there is the danger that a federal court will grant discovery in a civil rights suit which would interfere with the state's pending criminal prosecution.[82] These issues are among the most sensitive in the criminal law area.[83] Bear

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investigation report. *See id.* at 11. The presentence report contains background information on the offender, such as his prior record or financial condition, which is designed to enable the judge to tailor the sentence to the defendant. *See id.* at 32.

[80] Two state-federal judicial councils (Virginia and Maryland) apparently have adopted programs providing for the exchange of presentence reports between state and federal probation officers.

[81] *See supra* note 30.

[82] It must be borne in mind that interference by a federal court with proceedings in a state court is violative of the federal abstention doctrine. *See* Younger v. Harris, 401 U.S. 37, 43 (1971). In *Younger*, the Court stated: "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Id.* This same policy of noninterference with state proceedings is the basis of the exhaustion doctrine in the area of federal habeas corpus. *See infra* note 85 and accompanying text. The Supreme Court has emphasized:

> As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

Darr v. Burford, 339 U.S. 200, 204 (1950) (footnote omitted).

[83] *See* Note, *Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency*, 57 B.U.L. Rev. 864, 871-72 (1977); *see also* Hopkins,

in mind that, in the recent case of *Rose v. Lundy*,[84] the Supreme Court, in its desire to reduce the repetition of habeas corpus attacks upon state convictions, perhaps went too far by adopting a total exhaustion rule.[85] Petitioners now are required to exhaust *all* state claims in a petition before those already exhausted can be considered by the federal court. In many cases, rather than sending the prisoner back to the state to exhaust a plainly nonmeritorious claim, it might save the time of both court systems if the federal court were to resolve all issues at once. Justice Hopkins has suggested the establishment of a data bank which would keep the records of the prisoner's various petitions available to assist both state and federal judges in dealing with collateral attacks upon convictions.[86] He concluded that "the possibility of tension be-

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Federal Habeas Corpus: Easing the Tension Between State and Federal Courts, 44 ST. JOHN'S L. REV. 660, 665 n.34 (1970) ("an appeal is where one court is asked to show its contempt for another").

[84] 102 S. Ct. 1198 (1982).

[85] *Id.* at 1199. The case of Rose v. Lundy involved a mixed petition for habeas corpus, that is, a petition containing at least one claim as to which the applicant's state remedies had been exhausted and at least one as to which they had not. The exhaustion rule requires that each claim be exhausted before it can be considered by a federal court. *See* 28 U.S.C. § 2254(b) (1976). At the time Rose v. Lundy was decided, there existed a conflict among the circuits as to whether the exhausted claims presented in a mixed petition should be considered. The majority of circuits had held that the exhausted claims should be addressed. *E.g.*, Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969). Two circuits, however, had adopted the more demanding total exhaustion rule, requiring that the court dismiss all claims presented in a mixed petition. *See* Galtieri v. Wainwright, 582 F.2d 348, 355 (5th Cir. 1978) (en banc); Gonzales v. Stone, 546 F.2d 807, 810 (9th Cir. 1976). Adopting the more stringent total exhaustion rule, the Rose v. Lundy Court held: "[B]ecause a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, . . . a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." 102 S. Ct. at 1205 (footnote omitted). Notwithstanding the holding in Rose v. Lundy, the precise degree of exhaustion necessary remains to be seen. In his concurring opinion, Justice Blackmun noted that the two circuits that already had adopted the total exhaustion rule did allow exceptions. *Id.* at 1209 n.7 (Blackmun, J., concurring). Similarly, Justice Brennan observed, in an opinion rendered 1 month after Rose v. Lundy, that the Court was already ignoring its own total exhaustion rule. Engle v. Isaac, 102 S. Ct. 1558, 1578 (1982) (Brennan, J., dissenting). Justice Brennan remarked that "[i]n scarcely a month, the bloom is off the *Rose*." *Id.* (Brennan, J., dissenting).

[86] Hopkins, *supra* note 83, at 671. The Attorney General's Task Force on Violent Crime recently came to a conclusion similar to that of Justice Hopkins in a report written some 10 years after the Hopkins article. The report states:

> Criminal history information is vital to optimum performance of the criminal justice system. The police need adequate, accurate information for the prevention and investigation of criminal activity and for the apprehension of criminal offenders; prosecutors and the judiciary need such information for bringing offenders to justice; courts need additional information to determine appropriate sentences;

tween the two systems can be lessened by opening the channels of communication."[97]

Undoubtedly, other areas of tension exist. Most can be resolved, however, through common courtesy and consideration of the needs of other judges, lawyers and litigants. As to these matters, the state-federal judicial council may prove particularly useful in exposing points of friction and providing methods for greasing the gears of our judicial systems. A great deal can be accomplished on a personal level as federal and state judges invite each other to their conferences and establish closer social and professional relationships.

CONCLUSION

The American system of justice should be considered, whenever possible, as an integrated whole designed to meet the needs of all the American people. In both the criminal and civil spheres, states must, and should, continue to handle the overwhelming bulk of cases. Nevertheless, various methods for effectively utilizing joint resources can be developed. This may require partial elimination of the distinction which currently exists between federal and state courts, and may raise constitutional, legislative, and practical difficulties. Such methods, however, are well worth investigation with a view toward creating a cooperative federal-state system of justice.

The primary responsibility for better coordination rests with the legislature since it can provide a more rational division of jurisdiction and substantive law. The executive branch, moreover, particularly procecutors and police, must cooperate in allocating prosecutorial roles in order to prevent a breakdown of both federal and state systems of criminal justice. Judges, however, can encourage this process through their influence as members of the legal community. Occasional decisions that slightly modify the law so as to eliminate sources of friction between state and federal law officers also may be helpful. In the main, however, the judiciary has the minor role of adhering to rules of etiquette that permit

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and correctional agencies need it to select proper correctional programs. FINAL REP., *supra* note 74, at 67. The task force did not actually recommend the creation of a national data base, however, because alternative systems for making such information available are already being tested. *Id.* at 69.

[97] Hopkins, *supra* note 83, at 674.

members of the two judicial establishments to cooperate with a minimum of annoyance and interference and a maximum sense of pleasure in jointly serving the bar and public.

As Professor Winkle observes:

> The state-federal judicial council experiment is instructive for courts and federalism. It suggests in part that the intergovernmental process best achieves goals, at least modest ones, through cooperation, not competition. Separatism, isolation, and noncommunication undermine interjudicial harmony. Within a framework of interdependence, there is a distinct need to understand and to accommodate the federal and state interests whenever possible. . . . [A] complete view of judicial federalism cannot be confined to statutory rules and judicial decrees alone. The interplay of individual actors is a necessary dimension of that relationship.[88]

Joint training sessions, invitations to each other's conferences and the State-Federal Judicial Council can assist in improving the ability of state and federal judges to provide the public with more effective justice. At the same time, it must be emphasized that "Our Federalism"[89] and a sensitivity to intrusion on state courts' interest in enforcing state laws, should not impede the prompt vindication of federal constitutional rights by simple and economical procedures.

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[88] Winkle, *supra* note 31, at 252.

[89] Charles Alan Wright defines "Our Federalism" as the doctrine "which teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts." C. WRIGHT, *supra* note 1, § 52A, at 229. Justice Black referred to "Our Federalism" as:

> [T]he concept . . . represent[ing] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger v. Harris, 401 U.S. 37, 44-45 (1971).

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REFORM OF FEDERAL COURT RULEMAKING PROCEDURES*

JACK B. WEINSTEIN**

INTRODUCTION

The subject of this study is court control of court practice and related matters through court-promulgated rules. Rulemaking[1] powers are being exercised increasingly by national, state and local courts. Court rules have much the same form and effect as legislative enactments: they control all litigation falling within their ambit; they are subject to interpretation; and they may be declared invalid if found to be unconstitutional, or in conflict with legislation. In most instances the legislature has power to amend or reject rules adopted by a court.[2] In other instances rules adopted by a court or judicial body form an amalgam with statutory provisions adopted by the legislature.[3]

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* This Article is based on a series of lectures delivered at the Law School of Ohio State University in the Spring of 1976. The ground covered in the Article will be developed in more detail in a book by the author to be published by the Ohio University Press in 1977. The author is grateful for the assistance of William Bonvillian of the Connecticut and Washington, D.C., bars. Denise Cote and Keith Secular, both of the New York bar, have assisted in gathering material and have made editorial suggestions.

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[1] "Rulemaking" is sometimes used to refer to significant reformulation of decisional law. *See* G. HAZARD, REPRESENTATION IN RULE MAKING IN LAW AND THE AMERICAN FUTURE 85 (M.L. Schwartz ed. 1976). As Professor Hazard uses the term, rulemaking includes

> —the procedures used by courts and agencies performing adjudicative functions in adopting rules of procedure and rules governing their own internal administration;
> —the procedures used by appellate courts when they contemplate significant reformulation of decisional law.

Id. at 87. The term is not used in that sense in this Article.

The problem of administrative rulemaking as opposed to adjudication is not discussed in this Article. For a discussion of this problem see the panel discussion at the Federal Bar Convention described in 45 U.S.L.W. 2159, 2163 (9/28/76).

[2] The Federal Rules of Civil and of Criminal Procedure and the Federal Rules of Evidence are typical of this subjugation of court rulemaking to legislative control. New Jersey's highest court was almost unique in claiming that its power to adopt rules is not subject to legislative control; but that court has been forced to compromise this position. *See* notes 117-21 and 127-38 and accompanying text *infra*.

[3] The New York Civil Practice Law and Rules, for example, includes provisions adopted and modified by the legislature as well as those adopted by the New York State Judicial Conference subject to legislative veto or change. *See* N.Y. CIV. PRAC. LAW & R. § 102 (M. Bender Civ. Prac. Ann. 1975); N.Y. JUD. LAW § 229(3) (McKinney 1968).

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Each individual federal court is also generally empowered to adopt rules affecting its own practice. At the local level, court rules have been adopted by each of the federal district courts[4] and by each one of the circuit courts of appeals;[5] state courts have adopted similar local rules.[6]

Particularly at the federal level, the process of court rulemaking has worked fairly well: rules of evidence and rules for civil, criminal, bankruptcy and admiralty cases at both trial and appellate levels have been adopted and are generally acknowledged to be sound. The process, however, presents not only advantages but serious dangers. Some disturbing issues have arisen and substantial changes should now be considered. While this Article places primary emphasis on the national court system, considerable attention is given to the experience of the states because in rulemaking, as elsewhere, state courts provide effective laboratories for testing new approaches.[7]

The central thesis of this Article is that no pure theoretical source of rulemaking power exists. The taproot of rulemaking power in this country is legislative delegation, though there is also nourishment from the inherent role of a constitutionally independent judiciary. Consequently, when courts exercise rulemaking powers they should do so in general consonance with theories of delegation.

After a brief introduction, the Article examines the evolution of judicial independence from the twin theories of separation of powers and judicial review; it then explores the argument that the power of courts to make their own procedural rules is an integral aspect of judicial independence. From both an historical and practical perspective, it is concluded, however, that a delegation theory best achieves the practical balance between the legislative and judicial branches necessary for effective utilization of the rulemaking power. States where this balance has been tipped toward judicial control of rulemaking have ensnarled themselves in unnecessary difficulties and unseemly conflicts bwtween courts and legislatures.

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[4] Federal Local Court Rules (H. Fischer & J. Willis eds. 1972) is a collection in loose leaf form of civil and general local rules. There is no national collection of criminal rules.

[5] 28 U.S.C.A., United States Courts of Appeals Rules (1969).

[6] *See, e.g.*, rules for various New York courts collected in 1975-76 Civ. Prac. Ann. of N.Y. (M. Bender 1975).

[7] For bibliographies on the subject and summaries of rulemaking in United States jurisdictions, see ABA, Comm. on Standards of Judicial Administration, Standards Relating to Court Organization 76 (1974); F.J. Klein, Judicial Administration and the Legal Profession 290 *et seq.* (1963) (an invaluable book which will appear in a new edition in 1976); Study of Rule-Making Power, Third Preliminary Report of [N.Y.] Advisory Committee on Practice and Procedure (1959); Ashman, *Measuring the Judicial Rule-Making Power*, 59 J. Am. Jud. Soc'y 215 (1975) (summary of the excellent studies of the American Judicature Society); Blau & Clark, *Sources of Rules of State Courts*, 66 Law Lib. J. 37 (1973); Annot., 158 A.L.R. 705 (1945); Annot., 110 A.L.R. 22 (1937); American Judicature Society, Uses of the Judicial Rule-Making Power (1974) (mimeograph); American Judicature Society, The Judicial Rule-Making Power in State Court Systems (October, 1967) (mimeograph); J.A. Parness & C.A. Korbakes, A Study of the Procedural Rule-Making Power in the United States 68-76 (August, 1973) (mimeograph); C. Sherr, Bibliography—Rule-Making Power of the Courts (1928-1955) (1955) (unpublished bibliography on file at the Columbia Law School Library).

The remainder of the Article discusses reforms necessary for a more effective and less abrasive exercise of the rulemaking power including greater public deliberation and participation in the development of rules, the replacement of the Supreme Court by the Judicial Conference as the rulemaking body, limitation of congressional review of proposed rules to broad principles and outlines, and court restraint in initiating important substantive and jurisdictional changes through rulemaking. Comparable reforms are suggested in the areas of local court rules and individual judge's rules.

A. *Rulemaking as Legislation*

In certain respects, rulemaking by federal courts resembles a legislative rather than a judicial process. The departure from usual adjudicative patterns is most clearly exemplified by the absence of a controversy: at the level of national federal rulemaking, the Supreme Court lays down general standards applicable to all future cases without the aid of individual fact situations and adversary argument.[8] In rulemaking, the Court's legislative pronouncements are reviewed by Congress—a reversal of the usual practice under which congressional legislation is measured and interpreted by the courts in the light of constitutional and other requirements. In normal adjudications the Court's power is based upon the Constitution, although that power is limited by jurisdictional, venue and other provisions enacted by Congress. The Court's power to make rules, in contrast, was granted by Congress under specific limitations; having accepted that grant for many years, it is doubtful that the Court could claim inherent power if general rulemaking power were circumscribed.

Judicial rulemaking is further distinguished from adjudication by the absence of traditional limitations on its exercise. Where a court utilizes a case before it as an opportunity to pronounce broad principles and detailed regulations,[9] it is subject to the restrictions imposed by stare decisis.[10] Further constraints on judicial legislation are provided by the requirement that the controversy before the court be concrete, by the adversary nature of the proceeding, and by the need of the court to justify its decision by a reasoned opinion.[11] Moreover, the possibility exists of relatively easy modification through future interpretations and legislation.[12]

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> [E]ach Justice studies those rules. He is not given the benefit of any adversary report. . . . In the conference of the Court, a vote is taken as to whether the rule shall be submitted to Congress.

Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws, House Comm. on the Judiciary, 93d Cong., 1st Sess. 145 (1973) (testimony of Justice Arthur J. Goldberg) [hereinafter cited as *Evidence Hearings*].

[9] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

[10] *But see* Address by Judge Lumbard, Conference of Chief Justices in Honolulu (August 3, 1967). Judge Lumbard criticized Miranda v. Arizona, 384 U.S. 436 (1966), on the ground that the matter should have been treated by rulemaking, particularly since the American Law Institute was considering the matter as part of its work on pre-arraignment procedures.

[11] *But cf.* Vorenberg, *A.L.I. Approves Model Code of Pre-Arraignment Procedure*, 61 A.B.A.J. 1212, 1213 (1975) (suggesting that in promulgating rules for interrogation in Miranda

In the normal legislative process, there are equivalent safeguards promoting a reasoned determination acceptable to the public: the legislation must be publicly introduced; it is considered by committees; fact-finding research may be undertaken;[13] the views of the public are heard through representatives of pressure groups; and hypothetical and actual situations and precedents are tested against the draft to rectify careless articulation of the legislative standard. More generally, the varied backgrounds and regional interests of legislators normally exert a balancing effect on the final product; the prospect of answering to voters at election time encourages legislators to act with care. Finally, before the bill is approved, the public has the opportunity to place pressure on the executive. These are all very real protections in a democratic system.

The court rulemaking process is not subject to similar safeguards. Most of the discussion and decisionmaking takes place privately, so that the public may first become aware of a rule upon its publication after adoption. This is particularly true of local rules,[14] which may involve such important matters as jury size, sentencing policy, permissiblity of class actions, freedom of the press to publicize cases, and admission to the bar. Sometimes, as in the case of guidelines issued by higher courts, there is no publication even after adoption.[15]

Generally, the United States Supreme Court has adopted rules in a manner which affords considerable protection to the public: proposals are published by the Advisory Committee considering them; opportunity is then given to the public to comment; the Advisory Committee publishes revised drafts; the Standing Committee on Federal Rules of Practice and Procedure of the United States Judicial Conference reviews the proposals and makes changes; the United States Judicial Conference forwards them to the Supreme Court; the Court then adopts, modifies or rejects the proposals; and, finally, Congress has an opportunity to pass upon them. Within the last few years Congress has taken a more vigorous interest in national rules than in the past; it has made major modifications in the Federal Rules of Evidence and in the amendments to the Federal Rules of Criminal Procedure.[16] Nevertheless, the deliberations of the Advisory

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v. Arizona, 384 U.S. 436 (1966), the Court went far beyond the facts and overstepped proper judicial function). *See also* Mildner v. Gulotta, 405 F. Supp. 182, 201 (E.D.N.Y. 1975) (Weinstein, J., dissenting), *aff'd*, 425 U.S. 901 (1976). The dissent was based on minimum standards of right to be heard and to obtain a reasoned opinion in court cases.

[12] Change becomes awkward, however, when a decision is grounded upon constitutional imperatives. *See generally* Monaghan, *The Supreme Court 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

[13] *See* Linde, *Due Process of Law Making*, 55 NEB. L. REV. 197, 223-24 (1976).

[14] *See* text at notes 241-43 *infra*. *See generally* note 4 *supra*.

[15] *See, e.g.*, text at note 307 *infra*.

[16] *See generally* Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A.J. 1203 (1975).

Committee, which makes the basic decisions, are private.[17] It holds no public hearings, and while it does receive written communications, its membership and method of organization may make it particularly susceptible to the views of the courts, groups represented by its members and governmental bodies. Appointment of members by the Chief Justice gives him a great deal of direct and indirect influence on the Committee's decisions.

B. *Advantages of Rulemaking in Meeting Growing Pressures on the Courts*

The present wide-ranging role of courts in the social, economic, technical and political affairs of this country is a relatively recent development. When the Republic was in its infancy, it was generally agreed that common—that is, non-statutory— law, whether procedural or substantive, should develop by accretion through decision in individual cases. Dicta were, of course, not unknown and the courts were clearly aware of the prospective nature of their rulings in individual cases and of the impact of stare decisis on the law. The courts adhered fairly strictly, however, to the concept of separation of powers; at the federal level at least, they refused to render advisory opinions.[18]

This restrictive model of the courts' role began to break down early in this century. Antitrust cases requiring the courts to make national economic policy were a harbinger of a new approach. So, too, was the so-called "Brandeis brief," which recognized explicitly that substantive social policy was being developed by the courts.[19] Cases involving attacks on broad state legislative schemes—such as the public welfare cases of the twenties and thirties—were accepted. Congress modified substantive rights in ways that required the courts to resolve individual disputes involving large groups of persons and entities.[20]

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[17] Much of the information and conclusions in this Article is based upon the author's experiences as a member of the Federal Advisory Committee on Rules of Evidence, various committees of the United States Judicial Conference, the Second Circuit, the District Court for the Eastern District of New York, bar associations, and New York State legislative and judicial committees and commissions.

[18] *See* text accompanying notes 50-55 *infra*. This is not to say that there were no departures from this doctrine. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[19] *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 200[03]-[04] (1975); Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692 (1948). *Cf.* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1289-1304 (1976) (illustrating the procedural reforms of the litigation process which have resulted from the social aspects of the judicial function).

[20] Chief Justice Burger has commented:

> The tendency of Americans to try to resolve every sort of problem in the courts continues. Overwhelmed by increased demands for regulatory legislation, for broadened governmental programs of all kinds, Congress enacts legislation much of which reaches the courts for resolution.

Chief Justice Burger Issues Yearend Report, 62 A.B.A.J. 189 (1976).

Along with this broadening of the courts' role, heavy pressure from expanding concepts of due process—"individualized determination" as opposed to "categorical treatment"[21]—has increased the burdens of litigation.[22] The possibility of requiring less than full-fledged evidentiary trials by shaping procedural due process rules to reduce "the risk of error inherent in the truth-finding process"[23] in specific classes of cases, has promised a decrease in the growth rate of administrative hearings, but not yet in that of judicial trials. This country's original emphasis on individual liberty and personal rights, recently reinforced by the specter of modern totalitarianism, has not abated; "individual decision making"[24] on a huge scale provides a continuing challenge to the judicial system.

These changes have resulted in steadily mounting caseloads. Understandably, courts have sought ways to handle disputes on a wholesale rather than an individual basis while avoiding too sharp a departure from prior concepts of the limitations on their roles.[25] Modern court rules reflect these moves toward efficiency. Much of the current environmental, consumer and securities litigation, for example, has been made possible by an expanded class action rule,[26] while free intervention rules[27] and more flexible procedures generally have broadened the scope of litigation. Transfer and consolidation rules and statutes for pretrial proceedings and trials in multi-district litigation have made national litigation easier.[28] The applicability of res judicata has been expanded so that disputes among many parties can be disposed of in one case.[29] Standing requirements have been relaxed,[30] mootness has been ignored[31] and the significance of ripeness has

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As one example, Title VII legislation covering discrimination in employment, 42 U.S.C. § 2000e-z (1970), as amended, has given rise to a host of opinions relating to methods of testing and selecting municipal and private employees. *See, e.g.*, Albemarle v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); E.E.O.C. Guidelines, 29 C.F.R. § 1607 (1974).

[21] United States Department of Agriculture v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring).

[22] *See* Tribe, *Structured Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269 (1975); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 Stan. L. Rev. 449 (1975); Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to La Fleur*, 62 Geo. L.J. 1173 (1974).

[23] Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

[24] Crawford v. Cushman, 531 F.2d 1114, 1125 (2d Cir. 1976).

[25] *See* L. Lusky, By What Right? 302 (1975).

[26] *See generally Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1319 (1976). Class actions, however, have obviously made some of the appellate courts nervous. *Id.* at 1353. *Cf.* Wallace v. Kern, 499 F.2d 1345 (2d Cir. 1974) (wholesale relief for hundreds of prisoners held for excessive periods awaiting trial impermissible). *See also* Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299 (1973); *The Survey of New York Practice*, 50 St. John's L. Rev. 179, 189-96 (1975).

[27] *See, e.g.*, C. A. Wright, Law of Federal Courts 328 (2d ed. 1970).

[28] *See* 28 U.S.C. § 1407 (1970). A brief history of this legislation which created the Judicial Panel on Multidistrict Litigation is set forth in *Foreword*, Manual for Complex Litigation xvii-xix (1973) which was prepared by a committee of federal judges in consultation with professors and members of the bar.

[29] *See, e.g.*, M. Rosenberg, J. B. Weinstein, H. Smit & H. Korn, Elements of Civil Procedure ch. 15, § 4 (1976).

[30] *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972) (dictum); Flast v. Cohen, 392

declined.[32] Prospective overruling has reduced the burden of retroactivity, and has allowed quantum jumps in the development of substantive and procedural rights.[33] Federal courts have asked state courts for advisory opinions,[34] and state courts have granted them with increasing frequency.[35]

Techniques for efficient large-scale adjudication have also been developed extrajudicially. Organizations such as the N.A.A.C.P. Legal Defense Fund, the American Civil Liberties Union, and the Sierra Club are capable of orchestrating the development of an entire area of the law, such as desegregation of schools, capital punishment, abortion, the environment and the like.[36]

The rulemaking power examined in this Article is consonant with these other developments. It extends the reach of judicial power by promoting judicial efficiency and by permitting a single decision—whether in a case or by a rule—to have a wider impact.

I. Development of National Rulemaking Power

Procedures tend to be considered timeless by those who know no other system. Present methods of formulating national rules, unchanged for the past forty years, will be assumed by many to be writ in stone. A glance back over history is thus essential for understanding that options are available. Much of the section that follows seeks to demonstrate that there are no constitutional, theoretical or historical barriers to change.[37]

U.S. 83 (1968). *See also* L. LUSKY, *supra* note 25, at 133; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971). Limitation of the "political issue" doctrine has closed off, to some extent, another escape from federal court intervention. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 208-37 (1962).

[31] *See, e.g.*, Rosenbluth v. Finkelstein, 300 N.Y. 402, 404, 91 N.E.2d 581 (1950); Annot., 132 A.L.R. 1185 (1941).

[32] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 113-18 (1976).

[33] *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *rehearing as to remedy*, 67 N.J. 333, 339 A.2d 193 (1975); Hicks v. New Mexico, 88 N.M. 588, 544 P.2d 1153 (1976) (doctrine of immunity abolished for future cases only). *See also* L. LUSKY, *supra* note 25, at 76-79.

[34] AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 292-96 (1969).

[35] *See, e.g.*, Governor v. State Treasurer, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated as improvident advisory opinion*, 390 Mich. 389, 212 N.W.2d 711 (1973). For an analysis of the use of advisory opinions in the states, see Comment, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81 (1975).

The Supreme Court has been reluctant to render advisory opinions. *See, e.g.*, United States v. Fruehauf, 365 U.S. 146, 157 (1961), and cases cited therein; Liberty-Warehouse Co. v. Grannis, 273 U.S. 70 (1924). *Cf.* Buckley v. Valeo, 424 U.S. 1, 113-18 (1976) (finding of substantial controversy admitting specific relief through a decree of conclusive character distinguished the case from one requesting an advisory opinion and thus allowed the Court to render a decision). Not all legal scholars are opposed to having the Supreme Court render advisory opinions. *See, e.g.*, Aumann, *The Supreme Court and the Advisory Opinion*, 4 OHIO ST. L.J. 21 (1937); Note, *Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785 (1962); Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302 (1956). *But see* Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

[36] J. GREENBERG, LITIGATION FOR SOCIAL CHANGE: METHODS, LIMITS AND ROLE IN DEMOCRACY (1973).

[37] The historical development of rulemaking powers will be treated much more exten-

The extent and nature of the rulemaking power of federal courts is inextricably interwoven with attitudes about the function of courts in relation to other branches of government and about the limits of judicial independence. The rulemaking power has, nevertheless, evolved through pragmatic choices which have largely ignored the dilemmas posed by the theoretical underpinnings of the judicial system.

A. *Evolution of an Independent Federal Judiciary*

The evolution of rulemaking power in the United States is intertwined with the relation of courts to other branches of government. The extent of judicial independence has a crucial bearing on the courts' role in rulemaking, since it could be argued that a truly independent court system should control its own procedural rules. In this country, the extent of judicial independence in the rulemaking area has been, to a considerable degree, a function of evolving doctrines of separation of powers and judicial review.

1. *State Courts in the Colonial and Post-Revolutionary Eras.* Insofar as colonial opinion focused on the separation of powers, it was concerned primarily with the division of authority between the executive and the legislative branches, rather than with the extent of judicial power vis-á-vis either of these branches. After the outbreak of the Revolution, all of the states—proceeding from English theory, enlightenment thinking, and colonial experience—enacted constitutions as fundamental laws that generally reflected separation of powers doctrines.[38] Distinctions between the judiciary and other branches, however, were occasionally blurred;[39] judicial separation remained imperfect. The courts did, nevertheless, continue to modify practice on a case-by-case basis without legislative intervention; and stare decisis gave individual rulings substantial impact. Courts and the bar were actively altering practice and procedure by interstitial changes to meet the needs of a new society.[40]

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sively and in greater depth in the author's forthcoming book. *See* note * *supra*. The book will also discuss rulemaking practice in Great Britain, a subject beyond the scope of this Article.

[38] In New York, for example, draftsmen of the 1777 Constitution placed power to check the legislature in a Council of Revision rather than in the courts. The Council was empowered to reject "improper" legislation, and such legislation could not become effective unless two-thirds of each legislative house subsequently approved it. *See* 1 J. GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES 103-04 (1971). A number of states made provision for an independent judiciary: Delaware, Maryland, Massachusetts, New Hampshire, New York and North Carolina enacted provisions protecting judges' tenure in office; Delaware, Massachusetts, New Hampshire, Pennsylvania, North Carolina, South Carolina, and Virginia insured judicial salaries against reduction. *Id.* at 98 n.9. In Virginia, John Marshall pressed for a judiciary independent of executive restraints. *See* L. BAKER, JOHN MARSHALL, A LIFE IN LAW 91 (1974).

[39] Jefferson noted, for example, that on a number of occasions the Virginia Burgesses had decided controversies better left to judicial determination. 4 THE WORKS OF THOMAS JEFFERSON, *Notes on the State of Virginia* 21 (Fed. ed. P.L. Ford 1904-05). The executive branch in Pennsylvania usurped traditional judicial powers by committing persons to jail, setting bail, and interfering with civil litigation and habeas corpus proceedings. *See* 1 J. GOEBEL, JR., *supra* note 38 at, 99 n.14 (1971). The Supreme Judicial Court's duty to render advisory opinions was a part of the Massachusetts Constitution. MASS. CONST. ch. 3, art. 2 (1780).

[40] *See, e.g.*, Nelson, *The Reform of Common Law Pleading in Massachusetts 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97 (1973).

2. *The Constitutional Period.*

a. *The Philadelphia Convention.* The concept of separation of powers, acquired either through reading of enlightenment theory or colonial experience, was "axiomatic in contemporary political thinking," and almost universally shared by the framers of the Constitution.[41] Although this attitude governed the evolution of the articles on the legislative and executive branches, it was less clearly applied by the framers to the judiciary, largely because there were few precedents for truly separate and independent courts.

Convention consideration of a framework for the judicial branch focused initially on the "Virginia Plan," which proposed, *inter alia*, a system of independent federal courts, supreme and inferior, that was national in scope.[42] Opposed to this scheme was the "Paterson Plan," a proposal which envisioned a supreme court of very limited jurisdiction and no inferior federal courts. The Virginia Plan was eventually adopted, although several elements of Paterson's plan and another similar formulation were retained.

At the close of the first debates on the judiciary, the delegates unanimously approved a resolution which stated that federal legisiation would override any conflicting state laws, and that, as a result, the state judiciary would have to enforce this supremacy.[43] Judicial control over state enactments in conflict with federal laws provided a conceptual springboard to judicial control over congressional enactments conflicting with the Constitution. This final leap was in large part made in the final weeks of the convention during the debate over the Supremacy Clause.[44] Although only seventeen of the fifty-five delegates at the Convention stated that federal courts were empowered to pass on the constitutionality of congressional acts, this group was comprised of

> fully three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution, and four of the five members of the Committees of Style which gave the Constitution final form. . . . [They were] men who expressed themselves on the subject of judicial review because they also expressed themselves on all other subjects before the Convention. They were the leaders of that body and its articulate members.[45]

The Philadelphia Convention had conceived a judiciary of unprecedented power and independence. It might include a system of inferior courts as well as a Supreme Court; it was explicitly empowered to review actions of the state courts; and it was implicitly empowered to review the constitutionality of acts of Congress. Additional provisions protecting judges' salaries and tenure and establishing the dimensions of federal jurisdiction further emphasized the judiciary's autonomous power.

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[41] *See* 1 J. GOEBEL, JR., *supra* note 38, at 204.

[42] DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 955 (C.C. Tansill ed. 1927).

[43] II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (M. Farrand ed. 1966).

[44] *See* 1 J. GOEBEL, JR., *supra* note 38, at 241.

[45] E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 11-12 (1914).

b. *The Federalist Papers*. The five Federalist Papers dealing with the Judiciary, Numbers 78 to 82, further stressed the themes of judicial independence and authority. Federalist Number 78 formed the conceptual heart of Hamilton's attitude toward the judiciary: "The complete independence of the courts of justice is peculiarly essential in a limited constitution."[46] Arguing for judicial review of legislation's constitutionality, he denied that such review made the courts more powerful than the legislature: "[w]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter rather than the former."[47] Because of this crucial role performed by the courts, Hamilton urged that their independence be carefully protected.

c. *State Ratification Debates*. State debates over the adoption of the Federal Constitution centered on antifederalist fears that centralized executive and legislative powers would operate to the detriment of the powers of states and the rights of individuals; they dealt only infrequently with the judicial branch.[48] Professor Main concludes:

> [M]ost Antifederalists were satisfied with all or with the greater part of the judiciary article; the need for a national court system was nowhere challenged and most of its powers were accepted without question.[49]

B. *Advisory Opinions*

The degree to which the independence and authority of the federal judiciary were taken for granted seemed to indicate that there would be minimal opposition to judicial rulemaking. But the courts themselves created doubt as to whether they could make rules outside the context of a particular lawsuit by defining doctrines such as the advisory opinion rule—if the courts' adjudicative power must be limited to a particular case or controversy, it might be argued that their rulemaking power must be similarly circumscribed. The development of the advisory opinion rule thus provides a useful model for exploring judicial independence and its relation to rulemaking after the adoption of the Constitution.

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[46] THE FEDERALIST No. 78, at 491 (B. Wright ed. 1961) (A. Hamilton).

[47] *Id.* at 492.

[48] For a discussion of debates on Article III in the states, see 1 J. GOEBEL, JR., *supra* note 38, at 280-91.

[49] J. T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, 158 (1961).

In July, 1793, Thomas Jefferson, then Secretary of State, wrote a lengthy letter to Chief Justice John Jay and the Associate Justices of the Supreme Court seeking their advice.[50] On August 8, 1793, the Justices replied, refusing to give extra-judicial advice.[51] The Justices placed the bar against rendering advisory opinions to other branches on the strongest conceptual ground: the constitutional requirement of separation of powers. Since judicial rulemaking also involves at its heart a question of the appropriate division of roles among the three branches, it is necessary to consider whether judicial rulemaking is at odds with the traditional reluctance of the courts to render advisory opinions.

One is led to conclude that rulemaking is only partially controlled by the advisory opinion doctrine. Like advisory opinions, rulemaking occurs outside the focus of a case or controversy. In a sense rulemaking raises the same separation of powers issue that is at the heart of the ban on advisory opinions, since rulemaking solely by courts would represent an infringement on legislative power to make general laws for the structure of all governmental processes, including those of the courts.

However, there has never been a fully compartmentalized separation of powers. As Justice Tom Clark has candidly observed, "[T]here is much commingling, intermingling, and meddling among the three branches of federal government."[52] Chief Justice Burger has termed the view that the legislative and judicial branches should not talk to each other "a naive position not consistent with our constitutional system."[53] The Supreme Court similarly remarked in *Buckley v. Valeo*[54] that the draftsmen of the Constitution "saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Judicial independence cannot be absolute. Against the background of this scheme of government the advisory opinion analogy is not sufficiently precise: the rulemaking power is more legislative than advisory and falls within that twilight area created by practical necessity where activities of the separate branches merge.[55]

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[50] The letter read in part:

> The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances *which do not give a cognizance of them to the tribunals of the country*. . . . The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties.

3 Johnston, Correspondence and Public Papers of John Jay 486 (1891), *reprinted in* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 64 (2d ed. 1973) (emphasis in original) [hereinafter cited as Hart & Wechsler]. Earlier, the Chief Justice had rejected a request for support from Jefferson's political foe, Secretary of the Treasury Hamilton. *See* Dilliard, *John Jay*, in 1 The Justices of the United States Supreme Court 13-14 (L. Friedman & F. Israel eds. 1969).

[51] The letter to President Washington read in part:

> We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

3 Johnston, Correspondence and Public Papers of John Jay 488 (1891), *reprinted in* Hart & Wechsler, *supra* note 50, at 65-66 (emphasis in original).

[52] Clark, *Separation of Powers*, 11 Willamette L.J. 1 (1974). *See also* Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 391 (1976) ("The branches of government were not designed to be at war with one another. The relationship was not to be

C. *Historical Origins of the Rulemaking Power of Federal Courts*

Without any express discussion of the theoretical separation of powers dilemma posed by the rulemaking power, both Congress and the courts adopted a purely pragmatic solution to the issue of who should control rulemaking. In the Judiciary Act of 1789[56] and the Process Acts of 1789,[57] 1792,[58] and 1793,[59] a delegation theory was implemented, under which Congress assumed ultimate authority but gave the courts substantial power to adopt rules within a broad procedural outline.

1. *The Judiciary Act of 1789.* Much of article III of the Constitution was not self-enacting, but simply provided authority for implementing legislation. The Judiciary Act of 1789[60] was the first example of this extensive legislation. Section 17 of the Act empowered the several federal courts to establish their own rules "for the orderly conducting [of] business." The Act itself limited the extent of the courts' discretion to make rules by detailing a number of basic procedural requirements, but, as a whole, it recognized that courts would play a crucial role in shaping the law through common law judicial decision. The Act's direction, for example, that all writs, including non-statutory writs, be issued in accord with "principles and usages of law," underlined the courts' inherent procedural and rulemaking powers. Similarly, the courts were authorized to make

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an adversary one, though to think of it that way has become fashionable."); Address by Judge Henry Friendly, Bicentennial Lecture Series, Jan. 29, 1976.

[53] U.S. NEWS & WORLD REPORT, March 31, 1975, at 28, col. 1. *See also* [1974] CAL. JUDICIAL COUNCIL, ANNUAL REP. TO GOVERNOR, ch. 1 (pointing out the need to restructure the California Council on Criminal Justice to permit the judiciary to participate in planning criminal justice programs).

[54] 424 U.S. 1, 121 (1976).

[55] *Cf.* Levi, *supra* note 52, at 372 (discussing the ambiguities of the separation of powers doctrine from a historical perspective).

[56] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[57] Act of Sept. 29, 1789, ch. 21, 1 Stat. 93.

[58] Act of May 8, 1792, ch. 36, 1 Stat. 275.

[59] Act of March 2, 1793, ch. 22, 1 Stat. 333. The historical materials are collected in HART & WECHSLER, *supra* note 50, at 663. *See also* Goldberg, *The Supreme Court, Congress and the Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974).

[60] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

judgments "according as the right of the cause and matter in law shall appear unto them."[61]

Although in retrospect many of the Act's provisions seem a brilliant selective amalgam of varied state procedures, contemporary opinion was uneasy over some of the Act's imperfections. Madison, for example, hoped that the judges would subsequently reconsider and revise the Act.[62] His view probably reflected a contemporary attitude that implied power to design court procedures rested in the courts as well as in Congress.

2. *The Process Acts.* "An Act to regulate Processes in the Courts of the United States"[63] emerged late in 1789 from the same committee and Congress that had brought forth the earlier Judiciary Act. Although the Process Act was intended to establish the forms of process in the federal courts, through its subsequent revisions it had an impact on the powers of courts to set rules. Congress undertook revision of the 1789 Process Act in 1792. The version of the bill which was eventually enacted provided that equity, common law, and admiralty proceedings were

> subject . . . to such alterations and additions as the [federal] courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same. . . .[64]

In 1793 the courts' rulemaking power was again considered. To a Senate bill concerning the structure of the circuit courts, the House added a section shifting the power to make rules for practice from federal courts as a whole to the Supreme Court alone. The Senate apparently considered this too great a departure from previous policy and changed the language of the section to place rulemaking power in "the several Courts of the United States."[65]

The law enacted in 1793[66] continued the tendency of the 1792 Process Act to relax legislative control over rulemaking and to expand the courts' powers in that area. Although Congress retained the power to intervene to formulate rules of practice and procedure,[67] the practical authority to formulate rules had shifted to the courts.[68] In the following section, the development of particular sets of federal rules will be explored.

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[61] *Id.* § 32.

[62] 1 J. GOEBEL, JR., *supra* note 38, at 508, (citing letter of Madison to Pendleton of Sept. 14, 1789, Ms. Madison Papers XII, 30 (Library of Congress)).

[63] Act of Sept. 29, 1789, ch. 21, 1 Stat. 93.

[64] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275.

[65] Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333.

[66] *Id.*

[67] The bill provided in part that "it shall be lawful for the several courts of the United States . . . to make rules . . . in a manner not repugnant to the laws of the United States." *Id.*

[68] The placing of basic rulemaking power in the courts by the Process Act of 1793 was sweepingly reaffirmed in the Act of August 23, 1842, which provided:

> That the Supreme Court shall have full power and authority, from time to time, to

D. *Evolution of Present Federal Procedural Rules*

Currently, the Supreme Court and the lower federal courts are given general authority to establish rules for the conduct of their own business by section 2071 of title 28 of the United States Code. The Supreme Court possesses specific authority to prescribe rules of procedure for lower federal courts in bankruptcy cases,[69] in other civil cases,[70] and in criminal cases,[71] and to revise the rules of evidence.[72] This statutory framework is relatively young.

1. *Federal Equity Rules*. Equity was formerly viewed as distinct from law. Because equity was largely undeveloped in the states, section 34 of the Judiciary Act of 1789[73] was not made applicable to federal equitable actions. As a result, equity procedure developed without substantial pressures to conform with state procedures, and the Supreme Court possessed considerable freedom in equity rulemaking.

The Court, however, waited to exercise its power until 1822, when it issued thirty-three equity rules.[74] In 1842, the Supreme Court issued a revised set of ninety-two equity rules.[75] Long after the 1842 rules had become obsolete, the Supreme Court undertook a systematic revision, culminating in the Equity Rules of 1912.[76] Finally, in 1938, law and equity were merged in the federal courts by the superseding Federal Rules of Civil Procedure.[77]

2. *Admiralty Rules*. The Process Act of 1789[78] provided that admiralty proceedings should be conducted "according to the course of the civil

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> prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.

Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516. *See also* 13 Rev. Stat. §§ 913, 917, 918 (1878).

[69] 28 U.S.C. § 2075 (1970).

[70] 28 U.S.C. § 2072 (1970).

[71] 18 U.S.C. §§ 3771, 3772 (1970).

[72] 28 U.S.C. § 2076 (Supp. V, 1975).

[73] Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73. *See* text accompanying note 91 *infra*.

[74] 20 U.S. (7 Wheat.) v (1822).

[75] 42 U.S. (1 How.) xli (1842).

[76] 226 U.S. 627 (1912).

[77] For a discussion of the development of the Equity Rules, see HART & WECHSLER, *supra* note 50, at 664-65. *See also* Griswold & Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 HARV. L. REV. 483 (1929); Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276 (1922); Payne, *Counterclaims Under New Federal Equity Rule 30*, 10 VA. L. REV. 598 (1924); Talley, *The New and Old Federal Equity Rules Compared*, 18 VA. L. REV. 663 (1913) (discussing practice under old, pre-merger rules).

The merger of law and equity had begun to take place in the states ninety years earlier as a result of legislative, not court, initiative. *See, e.g.*, J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 103.01.

[78] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

law." With the Process Act of 1792, this stop-gap measure was replaced by a provision that admiralty proceedings were to be conducted "according to the principles, rules and usages which belong . . . to courts of admiralty. . . , as contradistinguished from courts of common law."[79]

From 1792 until 1844, the Supreme Court failed to exercise its admiralty rulemaking power and left the field to conflicting rules developed by district courts. Finally, drawing impetus from the reaffirmation of the rulemaking power in the Act of August 23, 1842,[80] the Supreme Court issued forty-seven admiralty rules in 1844;[81] these rules were not a comprehensive codification but were clarifications of, and additions to, traditional admiralty practice. In 1921 they were extensively revised.[82] In 1966, admiralty procedure was merged with civil procedure;[83] the Federal Rules of Civil Procedure are now applicable to admiralty as well as civil cases.[84]

3. *Bankruptcy Rules.* Article I, section 8 of the Constitution grants Congress the power "To establish . . . uniform laws on the subject of bankruptcies throughout the United States." Current bankruptcy laws are the product of an Act of July 1, 1898,[85] a major revision undertaken in 1938,[86] and approximately one hundred amendments to these acts.[87]

Shortly after passage of the Act of July 1, 1898, the Supreme Court formulated rules for bankruptcy proceedings.[88] The rules were frequently amended and were systematically revised in 1939.[89] They were again substantially revised in recent years pursuant to proposals of an Advisory Committee.[90]

4. *Federal Rules of Civil Procedure.* Section 34 of the Judiciary Act of 1789 provided:

> That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[91]

This "Rules of Decision Act" left it unclear whether state law was to govern procedure. The problem was remedied by the subsequent Process

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[79] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275.

[80] Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516.

[81] 44 U.S. (3 How.) iii (1844).

[82] 254 U.S. 671 (1921).

[83] 383 U.S. 1029 (1966).

[84] The Federal Rules of Civil Procedure do contain a supplemental list of special admiralty rules. *See* FED. R. CIV. P. 9(h), 14(a), 14(c), 38(e), 82, and Supp. Rules A-F. Prize proceedings are governed by 10 U.S.C. §§ 7651-81 (1970), pursuant to FED. R. CIV. P. 81(a). *See generally* HART & WECHSLER, *supra* note 50, at 666-67.

[85] Act of July 1, 1898, ch. 541, 30 Stat. 544.

[86] Act of June 22, 1938, ch. 575, 52 Stat. 840 (Chandler Act).

[87] The bankruptcy laws are compiled in title 11 of the United States Code.

[88] 172 U.S. 653 (1898).

[89] 305 U.S. 677 (1939).

[90] 96 S. Ct., rule amendments at 1 (July 1, 1976) (Chapter VIII); 96 S. Ct., rule amendments at 43 (June 1, 1976) (Chapter IX); 421 U.S. 1019 (1975) (Chapters X and XII); 415 U.S. 1003 (1974) (Chapter XI); 411 U.S. 989 (1973) (Chapters I-VIII).

[91] Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73.

Act of 1789, which required federal courts to follow, in actions at law, state procedure in effect at the time of the passage of the Act.[92] The Process Act of 1792 ratified this provision but made it subject to the rulemaking power of the Supreme Court and lower federal courts.[93]

While the Judiciary Act of 1789 dictated a dynamic conformity for substantive law, the Process Act of 1792 imposed a static conformity for procedural law. The courts did not exercise their rulemaking powers to alleviate this awkward situation. By the Conformity Act of June 1, 1872,[94] Congress replaced the rule of static conformity for procedure with dynamic conformity, and withdrew the theretofore unused judicial rulemaking power over procedure in actions at law.[95]

Despite the Conformity Act, distinctive federal practices began to emerge.[96] A sense that necessary procedural reform could be accomplished only by court rules drafted by judges and lawyers led to a movement for uniform federal procedural rules for civil cases.[97] This movement culminated, in 1934, in the passage by Congress of an act empowering the Supreme Court

> to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.[98]

Chief Justice Hughes led the Supreme Court in responding promptly to the rulemaking mandate.[99] In 1935, the Court issued a formal order appointing an Advisory Committee composed of eminent members of the legal profession.[100] The Advisory Committee's proposed rules received extensive evaluation and criticism by special bar and judicial committees. Its final proposals were approved with minor changes by the Supreme Court, and became effective on September 16, 1938.[101] The rules were subsequently amended with the assistance of the Advisory Committee.[102] In 1958 Congress ordered the Judicial Conference of the United States to

> carry on a continuous study of the operation and effect of the

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[92] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

[93] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275. *See also* Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333.

[94] Act of June 1, 1872, ch. 255, 17 Stat. 196.

[95] *Id.* § 5.

[96] *See* Herron v. Southern Pacific, 283 U.S. 91 (1931); McDonald v. Pless, 238 U.S. 264 (1915); *Hearings on S. 2061 Before a Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong., 1st Sess. 54 (1924) (remarks of Sutherland, J.); Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 401-11 (1935).

[97] *See* Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934).

[98] Act of June 19, 1934, ch. 651, 48 Stat. 1064.

[99] 13 ALI PROCEEDINGS 61 (1935-1936).

[100] Appointment of Comm. to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

[101] 308 U.S. 645 (1938).

[102] 341 U.S. 959 (1951); 335 U.S. 919 (1948); 329 U.S. 839 (1947); 308 U.S. 642 (1939).

> general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law.[103]

5. *Federal Rules of Criminal Procedure.* Prior to the promulgation of federal rules, federal criminal procedure was no more than an unwieldy conglomeration of common law practice, constitutional requirements, ad hoc legislation, and references to state laws.[104] Congress initially sought to resolve difficulties regarding procedure after verdict, and in 1933 authorized the Supreme Court to devise rules for this area.[105] In 1940, Congress expanded the Court's authority by allowing it to draft rules for criminal proceedings prior to and including the verdict.[106] The resulting Federal Rules of Criminal Procedure became effective in 1946,[107] and have since been amended several times.[108]

6. *Federal Rules of Appellate Procedure.* In 1968, rules concerning appeals were severed from those applicable to trial procedure. A separate set of Rules of Appellate Procedure was promulgated pursuant to an advisory committee's recommendations.[109]

7. *Federal Rules of Evidence.* In early years there had been considerable confusion about "whether given evidence questions were to be decided in accordance with the Competency of Witnesses Act, the Rules of Decision Act, the Conformity Act . . . , or some other standard."[110] It was not until 1942 that the American Law Institute's Model Code of Evidence was formally adopted, and not until 1953 that the Commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence. Relying in part on the availability of these models and on the need for clarification and improvement of the federal law of evidence, critics increased pressure for federal rules.[111] Shortly thereafter, a Special Committee on Evidence appointed in 1961[112] by the Chief Justice concluded that the rulemaking "power *conferred by . . . enabling acts of Congress*,"[113] permitted prom-

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[103] 28 U.S.C. § 331 (1970). *See also* Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. Am. Jud. Soc'y 250, 253 (1963).

[104] Hart & Wechsler, *supra* note 50, at 667.

[105] Act of February 24, 1933, ch. 119, 47 Stat. 904, *as amended*, Act of March 8, 1934, ch. 49, 48 Stat. 399, *reenacted*, 18 U.S.C. § 3772 (1970).

[106] Act of June 29, 1940, ch. 445, 54 Stat. 688, *reenacted*, 18 U.S.C. § 3771 (1970).

[107] 327 U.S. 821 (1946).

[108] *See* 96 S. Ct., rule amendments at 1 (June 1, 1976); 419 U.S. 1133 (1975); 416 U.S. 1001 (1974); 415 U.S. 1056 (1974); 406 U.S. 979 (1972); 401 U.S. 1025 (1971); 389 U.S. 1125 (1968); 383 U.S. 1087 (1966); 350 U.S. 1017 (1956); 346 U.S. 941 (1954); 335 U.S. 917, 949 (1948).

[109] 389 U.S. 1063 (1968).

[110] Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts 3 (Feb. 1962) (footnotes omitted) [hereinafter cited as Preliminary Report on Evidence].

[111] *See, e.g.*, Estes, *The Need for Uniform Rules of Evidence in the Federal Courts*, 24 F.R.D. 331 (1960); *Report of the Special Comm. on Uniform Evidence Rules for Fed. Cts. to the House of Delegates, American Bar Association*, 44 A.B.A.J. 1113 (1958); Green, *The Admissibility of Evidence Under the Federal Rules*, 55 Harv. L. Rev. 197, 225 (1941).

[112] Preliminary Report on Evidence, *supra* note 110, at 2.

[113] *Id.* at 29 (emphasis added).

ulgation of rules of evidence,[114] and recommended that the Supreme Court formulate such rules.[115] The Federal Rules of Evidence were finally approved by Congress in 1975, after years of work and controversy. Professor Cleary has noted that "[t]he rules as finally enacted are the joint product of the rulemaking process as evolved by the Supreme Court and the legislative process as conducted by the two houses of the Congress."[116]

In sum, the national rulemaking experience demonstrates no rigidity in doctrine or practice. While changes in the process of rulemaking have often lagged behind the need for change, lethargy more than ideology has been responsible for outmoded practice in rulemaking. There are now clear signals that further changes are needed in the way rules for courts are developed.

III. IDEOLOGY SUCCUMBS TO PRACTICALITY: COURTS AND LEGISLATURE BOTH HAVE A ROLE IN RULEMAKING

As demonstrated above, the history of rulemaking at the federal level shows a practical accommodation between the legislature and the courts. There have been serious suggestions, however, that the legislature can have no role in rulemaking. Generally this claim has been ignored by those charged with the practical task of running government. Recent history in New Jersey and elsewhere is instructive.

A. *The New Jersey Experience*

The New Jersey Supreme Court under Chief Justice Vanderbilt, relying on a state constitutional provision granting rulemaking power to the courts,[117] took the position in *Winberry v. Salisbury*[118] that its rulemaking power was not subject to legislative control: a rule would stand even if it were inconsistent with a subsequently adopted statute.[119] In support of its position, the New Jersey court pointed to the "intolerable" conflict that would result if its overruling of a statute by court-made rule were followed by legislative readoption of the statute, and, in turn, judicial readoption of the rule.[120] But as Professor (now Judge) Kaplan and his associate, Greene, have pointed out, the problem is not insoluble given the assumption "that court and legislature will exhibit a decent amount of mutual respect and tolerance."[121]

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[114] *Id.* at 32 n.125, 35 n.138.

[115] *Id.* at 48-54.

[116] Cleary, *Preface* to FED. R. EVID., at v (Federal Judicial Center ed. 1975).

[117] N.J. CONST. art. VI, § 2, ¶ 3: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts."

[118] 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950).

[119] *Id.* at 255, 74 A.2d at 414. The New Jersey court continues to cite *Winberry* with approval. *See* American Trial Lawyers v. New Jersey Supreme Court, 66 N.J. 258, 262, 330 A.2d 350, 352 (1974) (contingent fees); Columbia Lumber & Millwork Co. v. New Jersey Supreme Court, 12 N.J. 117, 95 A.2d 914 (1953) (*Winberry* applied to hold a statute in conflict with a court rule invalid). The decision is examined in Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234 (1951) and Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952). For a discussion of issues raised by *Winberry*, see Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958); Note, 27 RUTGERS L. REV. 345 (1974).

The New Jersey position in *Winberry* is almost unique. Other courts have taken what Kaplan and Greene refer to as "the circumspect approach"[122] in working cooperatively with the legislature.[123] The majority approach seems the wiser one; so long as the legislature is not seeking to destroy a court's power to act effectively, statutes should supersede rules. The Anglo-American experience with rulemaking demonstrates no need for the courts to have unfettered control over procedure through rulemaking. Should a legislature's acts deny due process or infringe other constitutionally protected rights, the courts have reserve adjudicative powers to strike down the offending legislation.[124]

There has been in the last fifty years "a growing recognition of the soundness of the policy of vesting comprehensive rule-making power in the courts, with accountability in the last analysis in the legislature."[125] No serious student of the subject would today accept Wigmore's thesis that the legislature has no power to effect judicial procedure.[126]

New Jersey's near-fiasco over rules of evidence shows why the absolutist attitude of Justice Vanderbilt and a few others on the issue of procedural rules cannot be sustained. In 1954, the Supreme Court of New Jersey appointed an advisory committee to study the Uniform Rules of Evidence which had just been approved by the American Bar Association. That committee published its report in May, 1955, comparing the Uniform Rules with existing New Jersey evidence law, making recommendations for amendments, and calling for adoption.[127] In October of that year the legislature appointed a special commission to study the Uniform Rules and make recommendations. Its report was issued in November, 1956.[128]

As a result of the conflict between the branches over whether the rules should be adopted by the state supreme court pursuant to its constitutional authority to regulate practice and procedure,[129] or by the legislature in the form of a statute,[130] action on the evidence rules was stalled for the next several years. At the heart of this dispute, of course, was the position taken by the court in *Winberry*.

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[120] 5 N.J. at 244, 74 A.2d at 408.

[121] Kaplan & Greene, *supra* note 119, at 247.

[122] *Id.* at 247 n.60.

[123] *See, e.g.*, Grant v. Curtin, 71 A.2d 304 (Md. Ct. App. 1950).

[124] *See, e.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (statutory garnishment proceedings invalid).

[125] Kaplan & Greene, *supra* note 119, at 251.

[126] Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928), *reprinted in* 20 J. AM. JUD. SOC'Y 159 (1936). *See* Pound, *The Rule Making Power of the Courts*, 12 A.B.A.J. 599, 600 (1926).

[127] REPORT OF THE COMM. ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955).

[128] REPORT OF THE COMM'N TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE OF THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY (1956).

[129] N.J. CONST. art. VI, § 2, ¶ 3. The text of this provision is set forth in note 117 *supra*.

After Chief Justice Vanderbilt died, his successor, Chief Justice Weintraub, met with legislative leaders to work out a practical compromise. Pursuant to their agreement, the New Jersey Evidence Act of 1960 was adopted.[131] The Act included the rules of privilege and a modified Dead Man statute, and provided detailed procedures authorizing the supreme court to adopt the remaining rules of evidence. One provision required that proposed rules be presented, before adoption, to a judicial conference at which the various courts and bar associations, the legislature, the Attorney General, county prosecutors, law schools and "members of the Public" would be represented.[132]

As part of the arrangement between the chief justice and legislative leaders, the Supreme Court of New Jersey appointed a second advisory committee in 1960. The rules proposed by the advisory committee were adopted by the supreme court in 1964 to become effective, pursuant to the provisions of the Act, in 1965.[133] However the legislature, through a series of amendments, delayed the effective date to 1967.[134]

It is interesting that after enactment of the rules of evidence the New Jersey legislature created a "Permanent State Rules of Evidence Review Commission," consisting of members of the legislature and private citizens, to advise the legislature with respect to future proposed changes in the rules.[135] The Commission's title was later amended to substitute the word "Court" for "Evidence,"[136] suggesting that the *Winberry* case was subject to still further erosion. In effect, New Jersey seems to be approaching much the same practical balance in rulemaking as other American jurisdictions; although commentators still talk of "complete" rulemaking power not subject to subsequent action by the legislature,[137] the concept is essentially illusory.[138]

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[130] *See, e.g.*, *How Shall the Proposed Code of Evidence be Adopted*, 78 N.J.L.J. 316 (1955); *Report on Manner of Adopting Proposed Evidence Code*, 78 N.J.L.J. 349 (1955) (reporting suggestion of Essex County Bar Association that the legislature, and then the court, adopt the same provisions as a way out of the impasse); Kean, *An Analysis of the Report of the Legislative Commission to Study the Improvement of the Law of Evidence*, 79 N.J.L.J. 473 (1956); *Evidence Revision by Cooperation*, 79 N.J.L.J. 496 (1956) (editorial calling for cooperation); *Vanderbilt Critical of Evidence Bill*, 80 N.J.L.J. 213 (1957); *Bigelow Urges Codification of Evidence Rule*, 80 N.J.L.J. 205 (1957); *Statement by Josiah Stryker at Legislative Hearing on Evidence Revision*, 80 N.J.L.J. 211 (1957); *Milton Submits Comments on Evidence Revision*, 80 N.J.L.J. 241 (1957); *Codification of Evidence Law Favored by Unanimous Vote*, 80 N.J.L.J. 253 (1957); *Statement of Milton T. Lasher, President, New Jersey State Bar Association, Concerning the Proposed Evidence Code*, 80 N.J.L.J. 269 (1957). *See also* Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725, 736 (1961); Brooks, *Evidence*, 14 RUTGERS L. REV. 390, 391-92 (1960).

[131] L. 1960, c. 52, p. 461, § 33 (codified at N.J.S.A. 2A:84A-33 (West 1976)).

[132] N.J.S.A. 2A:84A-34 (West 1976).

[133] N.J.S.A. 2A:84A-35 (West 1976).

[134] *See generally* L. 1965, c. 56, § 2, *as amended by* L. 1966, c. 184, § 2; L. 1967, c. 3, § 1 (codified at N.J.S.A. 2A: 84A-35 (West 1976).

[135] L. 1968, c. 183, § 1, eff. July 19, 1968 (codified at N.J.S.A. 2A:84A-39.1 (West 1976)).

[136] L. 1970, c. 258, § 2, eff. Nov. 2, 1970 (codified at N.J.S.A. 2A:84A-39.1 (West 1976)).

B. *Experience in Other States*

Despite the untenability of the New Jersey position, courts still flex their muscles occasionally, making extravagant claims of exclusive power over rules.[139] An extreme example is provided by *State v. Clemente*,[140] in which the Connecticut Supreme Court struck down a statute granting criminal defendants discovery rights equivalent to those provided by section 3500 of title 18 of the United States Code, under the theory that the legislature had no authority to make rules for the court. In a thorough historical analysis of Connecticut cases, Professor Kay has termed the decision to be of a "radical character."[141] He concludes:

> [T]he best safeguard to the proper balance between the courts and other departments of government lies in the responsibility of judges to exercise restraint and temperance in deciding questions touching upon their own power. In the assertion of exclusive and supreme power over matters of practice and procedure, the Connecticut Supreme Court has failed in that responsibility.[142]

Apparently, the New Mexico Supreme Court has also taken this extreme position recently. In Rule 501 of its Rules of Evidence the state supreme court provides:

> Except as otherwise required by constitution, and except as provided in these rules *or in other rules adopted by the Supreme Court*, no person has a privilege. . . .[143]

Not only has the court thus abolished prior statutory privileges,[144] but it has apparently taken the position that even statutory privileges subsequently enacted by the legislature would be invalid.[145]

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[137] *See, e.g.*, Note, *The Rule-Making Powers of the Illinois Supreme Court*, 1965 U. Ill. L.F. 903, 906.

[138] Nevertheless, New Jersey courts retain more freedom than most to deal with substantive issues through rulemaking rather than adjudication. Busik v. Levine, 63 N.J. 351, 307 A.2d 571 (1973), *dismissed for want of a federal question*, 414 U.S. 1106 (1973), *noted in* 27 Rutgers L. Rev. 345 (1974), a recent decision to control the substantive question of prejudgment interest by rule, extends rulemaking power further than most authorities would permit. Criticizing this expansionist approach, Professor Lynch has called it "An Undue Process." Lynch, *The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy*, 4 Seton Hall L. Rev. 19; 421, 496 (1972-73).

[139] *See, e.g.*, Cohn v. Borchard Affiliations, 30 App. Div. 2d 74, 289 N.Y.S.2d 771 (1st Dep't 1968), *rev'd*, 25 N.Y.2d 237, 303 N.Y.S.2d 633 (1969) (provision governing dismissal for failure to prosecute held invalid), *noted in* 43 N.Y.U. L. Rev. 776 (1968); State v. Clemente, 166 Conn. 501, 353 A.2d 723, 727 (1974), *strongly criticized in* Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 Conn. L. Rev. 1 (1975); State v. Bridenhager, 257 Ind. 699, 707, 279 N.E.2d 794, 796 (1972); Newell v. State, 308 So. 2d 71, 77 (Miss. 1975); State v. Smith, 84 Wash. 2d 498, 527 P.2d 674, 677 (1974).

[140] 166 Conn. 501, 353 A.2d 723 (1974).

[141] Kay, *supra* note 139, at 22.

[142] *Id.* at 43.

[143] N.M. Stat. Ann. § 20-4-501 (Supp. 1975) (emphasis supplied). By contrast, Fed. R. Evid. 501 acknowledges the legislature's power, as do the rules of other states which use the Federal Rules of Evidence as a model. *See* Fla. R. Evid. 50.501; Me. R. Evid. 501; Nev. R. Serv. § 49.015; Wis. R. Evid. 905-01.

[144] N.M. Stat. Ann. § 20-1-12(c) (1953) (accountant); N.M. Stat. Ann. § 20-1-12.1 (1953) (news sources); N.M. Stat. Ann. § 54-11-39 (1953) (medical research); N.M.

While it may sound like heresy to the staunch supporters of unfettered judicial rulemaking,[146] legislative control of procedure works fairly well where there are broad-based, active, well-financed agencies to prepare the necessary studies and legislation. Judge Tate has expressed such a view regarding the Louisiana system,[147] where the legislature makes court rules:

> The writer is not convinced that . . . a transfer of rule-making powers [to the courts] is necessarily desirable at this time. On the whole, with the able ministrations of the Law Institute and Judicial Council and the respect shown by the legislature for these law-improvement agencies, statutory rule-making has worked well in Louisiana.[148]

Even the most ardent supporters of rulemaking by the highest appellate court in the jurisdiction have had to concede that the power, when granted, often goes unused.[149]

Procedural reform in this country has never been the sole prerogative of either legislature or courts. At times the courts have laid the framework for reform, as in the late eighteenth century.[150] At other times, during periods of judicial stagnation, as in the middle nineteenth century, legislative enactments such as the Field Code have been the primary vehicles for change.[151] During the greater part of this century the most striking reforms have been achieved through court-made rules—most notably the various federal rules. Nonetheless, statutory changes have not been uncommon; they have ranged from business entry exception statutes[152] to the multiple procedural innovations of no-fault automobile liability statutes.[153]

Stat. Ann. § 67-30-17 (1953) (certified psychologist). *See* Ammerman v. Hubbard Broadcasting, Inc., — N.M. —, 551 P.2d 1354 (1976) (striking down newsperson's privilege).

[145] This assumption is based upon conversations of the author with members of the bench, bar and legislature of New Mexico. *See also* 2 J. Weinstein & M. Berger, *supra* note 19, ¶ 501[06] (Supp. 1976).

[146] *See, e.g.*, Ashman, *Measuring the Judicial Rule-Making Power*, 59 J. Am. Jud. Soc'y 215 (1975).

[147] Tate, *The Rule-Making Power of the Courts in Louisiana*, 24 La. L. Rev. 555, 568 (1964).

[148] If rulemaking power were granted the courts, Judge Tate suggested that the legislature retain general supervisory power. "In the future, a less progressive court system might take too parochial a view of the regulation of judicial procedure, a matter which is after all the concern of our entire people, not just of the bench and bar." *Id.*

[149] *See, e.g.*, Ashman, *Measuring the Judicial Rule-Making Power*, 59 J. Am. Jud. Soc'y 215, 219 (1975). For a full and excellent survey, see American Judicature Society, Uses of the Judicial Rule-Making Power (1974) (mimeograph).

[150] *See* Nelson, *supra* note 40, at 98.

[151] *See, e.g.*, C. Clark, Handbook of the Law of Code Pleading 17-19 (1928); Pound, *David Dudley Field: An Appraisal* in David Dudley Field: Centenary Essays 1 (1949). *Cf.* Kaplan & Greene, *supra* note 119, at 252 (discussing legislative reform in New Jersey).

[152] *See, e.g.*, N.Y. Civ. Prac. Law & R. § 4518, *superseding* N.Y. Civ. Prac. Act § 374a (McKinney 1963). *See also* Act of June 25, 1948, ch. 646, 62 Stat. 945, *as amended*, 28 U.S.C. § 1732 (Supp. IV, 1974).

[153] *See, e.g.*, Ill. Ann. Stat. ch. 73, §§ 1065.150-.163 (Smith-Hurd 1965), *repealed*, 1976 Ill. Laws Pub. Act 78-1297, § 22; N.Y. Ins. Law §§ 670-77 (McKinney Supp. 1975); Pa. Stat. Ann. tit. 40, §§ 1009.101-.701 (Purdon Supp. 1976).

In sum, some sort of role-sharing between courts and legislatures is both necessary and beneficial. Where courts have insisted on exclusive control over rulemaking, the practical results have not been useful.

IV. Reforming National Rulemaking

A. *Congressional Power to Delegate and Modify Terms of Delegation*

In contrast to some of the states, the federal courts have recognized that rulemaking is ultimately a legislative power residing in Congress, although delegated in large measure to the courts. In upholding the validity of the Process Acts,[154] Chief Justice Marshall, writing for the Supreme Court in *Wayman v. Southard,*[155] recognized that an aspect of the Process Act of 1792 concerned the power of courts to prescribe rules for proceedings.[156] Mr. Justice Marshall thus seemed to view the courts' rulemaking power as descending by specific delegation from Congress rather than deriving from an independent judicial authority to formulate procedural rules.[157]

At one time it might plausibly have been argued that delegation to the courts of such non-adjudicative functions as rulemaking was improper. History has, as already noted, made that argument untenable.

Congress' position as possessor and delegator of the rulemaking power is now assumed without question by the federal courts. The Supreme Court in *Sibbach v. Wilson & Co.,*[158] for example, simply asserted:

> Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States. . . .[159]

Since the mid-1930's the rulemaking function has been delegated almost entirely to the courts; Congress' power over the area has been reduced to a monitoring status. As a result of the Supreme Court's long-standing acknowledgement of the congressional prerogative over rulemaking and the extensive delegation of this function to the courts, the only questions that have arisen concerning the rulemaking power involve the extent and propriety of the delegation to the courts. The Supreme Court addressed these issues in the *Sibbach* case.

In *Sibbach*, the Court was faced with a question of the validity of certain Federal Rules of Civil Procedure; Congress had been given an opportunity to modify or veto these rules in accordance with the terms of the Enabling Act of 1934, but had not done so. The Court held that even though the Rules worked a major departure from past procedures, specific congressional approval was not necessary:

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[154] *See* text accompanying notes 63-67 *supra*.

[155] 23 U.S. (10 Wheat.) 1 (1825).

[156] *Id.* at 41-42.

[157] *See* Beers v. Haughton, 34 U.S. (9 Pet.) 329, 359-61 (1835); Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53 (1825).

[158] 312 U.S. 1 (1941).

[159] *Id.* at 9-10.

> The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the *Botsford* case, as did the Report of the Advisory Committee and the notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.[160]

Justice Frankfurter, joined by Justices Black, Douglas, and Murphy, dissented, stating in part:

> Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality. And so I conclude that to make the drastic change that [the rule in question] sought to introduce would require explicit legislation.[161]

The two views in the *Sibbach* case, then, present the dilemma resulting from the uncertain division of the rulemaking power between courts and legislature. Rulemaking of necessity falls into a blurred area where precise separation of the powers of the independent branches is inappropriate. Inapplicability of strict separation of powers theory does not, however, require total abandonment of the concept in the context of rulemaking. Experience with general powers of legislative delegation may supply some helpful guidelines in striking a proper balance between the roles of the courts and the legislature in rulemaking. The administrative agencies, which assume legislative, executive and judicial roles, furnish one useful analogy.

Under the traditional model of tripartite government, at least as formulated by the framers of the Constitution, Congress is the source of policy-making power. This is consonant with the fact that, of the three branches, Congress bears the closest relationship to the people—the ultimate source of power in any democracy. Under the doctrine of legislative delegation,

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[160] *Id.* at 15-16.
[161] *Id.* at 18 (Frankfurter, J., dissenting).

Congress defers to the expertise of a delegate body, allowing it to act as a legislature in a particular area, under the general policy formula dictated by Congress. An outmoded theory of constitutional limits on legislative delegation held that if Congress failed to outline a sufficiently specific policy in the legislation creating the delegate body, the delegation failed and the acts of the delegate body were void.[162] Largely because the courts abused this doctrine, using it to throttle economic and social legislation in the 1930's,[163] the theory of constitutional limits on delegation has been generally ignored or given mere lip service for several decades.[164] As one commentator has recently noted, this refusal by the courts to insist that Congress' policy-making rôle be preserved, coupled with Congress' own failure to assert its role, has contributed to one of the major governmental developments of recent times: a dramatic expansion of the powers of the executive branch (exercised largely through a myriad of semi-independent agencies), and a correspondingly drastic decline in the power of the legislative branch.[165]

It may be that the courts still have a role to play in restoring to some degree the balance between executive and legislature, and that revival of the doctrine of constitutional limits on legislative delegation would be appropriate. Just as this doctrine may retain utility in the area of legislative policy control over the executive, it may also be useful in those areas in which the legislature supervises activities of the judicial branch. The position of Chief Justice Marshall in *Wayman v. Southard*[166] remains valid today: the rulemaking power of the courts is properly viewed as a legislative delegation.

It follows from this view that Congress should at least have the option of establishing basic policy guidelines for court rules. Thus, the practice of submitting proposed court rules for congressional approval or modification seems altogether appropriate; such a process conforms to the basic tenets of delegation theory.

It would be a mistake, however, for Congress to insist on reviewing proposed rules in minute detail. Rulemaking is delegated so that Congress may profit from the expertise of courts and specialists in areas of litigation procedure with which they are far more conversant than Congress. Unless

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[162] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 426 (1944); Panama Refining Co. v. Ryan, 293 U.S. 388, 415, 421, 430 (1935); United States v. Chicago, Mil., St. P. & Pac. R.R., 282 U.S. 311, 324 (1931); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41-43 (1825).

[163] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). For a discussion of *Schechter* the "sick chicken" litigation, see BELLUSH, THE FAILURE OF THE NRA 168-70 (1975).

[164] On the difficulties of defining constitutional limitations on the congressional delegation power, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.01-.06 (1958); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947).

[165] *See* Gewirtz, *The Courts, Congress and Executive Policy-Making*, 39 L. & CONTEMP. PROB. — (1976) (in publication). *See generally* A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041 (1975).

[166] 23 U.S. (10 Wheat.) 1 (1825). *See* text accompanying note 155 *supra*.

Congress confines itself to the basic policy issues concerning the proposals submitted to it, the ends sought to be achieved by the delegation will be undercut.

The problem, of course, is to distinguish basic policy from mere detail. A few guidelines can be suggested. First, congressional review of the initial draft of a set of rules and of the new policies they reflect will generally be more appropriate than review of the occasional subsequent amendments, which usually only round out an existing policy framework. Only where new amendments depart sharply from already approved policies does congressional scrutiny seem desirable.[167]

Second, Congress should scrutinize rules and amendments that may have a substantive effect more carefully than those that will probably have a technical or procedural effect.[168]

Third, while many rules have substantive effect, some such rules seem more fitting for review than others. For example, court rules which would impair the ability of particular individuals to obtain a full hearing or to present evidence adequately would seem particularly appropriate for congressional scrutiny.[169] Public hearings at the drafting stage should help to reveal such areas of concern.

Obviously, any list of priorities for congressional review must be tentative. The effectiveness of the rulemaking mechanism under a delegation system depends heavily on the wisdom of Congress in exercising a considered restraint; absent this, the expertise of the various advisory committees will be almost valueless. Nonetheless, the delegation theory properly requires that congressional power to review be recognized. Historically, as already noted, such a balanced rulemaking process has proved effective.

If Congress is to exercise restraint, so, too, must the courts. Where substantial substantive policies are at stake or fundamental jurisdictional issues are raised, the courts should refrain from treating the matter by rules, but should, through the Judicial Conference or groups such as the American Bar Association, seek appropriate legislation. In retrospect, for example, it probably was a mistake for the Supreme Court and the Advisory Committee on Evidence to attempt to force uniform privilege rules on the federal courts.[170] These proposals caused a furor in Congress which rightly believed that they involved substantive policies. Similarly, reduction of jury size from twelve to six, discussed below in connection with local rules, should not have been accomplished through rules. Yet, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is now circulating a Proposed Rule 35.1 of the Federal Rules of Criminal Procedure, providing defendants with the right to appeal from sentences they consider too harsh.[171] While appellate review of sentences seems to the author sound, there appears to be no basis in statutory authority or in the history of the courts of appeals warranting such extension of jurisdiction through exercise of the rulemaking authority.[172] Appeals are covered by statute,[173] and the matter of sentencing review ought to be handled by statute as well, since it involves a substantial extension of the jurisdiction of the courts of appeals. Congress would have to consider the desirability of the rule and, if it were adopted, would need to add substantial personnel to the courts so that the new jurisdiction could be effectively exercised. The judgments in this area are not easy, particularly since excessive restraint may result in neither Congress nor the courts taking the necessary initiative.

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[167] In this regard, congressional review of the new Federal Rules of Evidence, particularly as they affect privileges, FED. R. EVID. 501, and of amendments to the Federal Rules of Criminal Procedure involving plea bargaining, FED. R. CRIM. P. 11(e), would be appropriate.

[168] While it was not clear at the time of their adoption, amendments to the class action rules of the Federal Rules of Civil Procedure, FED. R. CIV. P. 23, probably fall within the former category.

[169] Proposals dealing with habeas corpus proceedings might fall into this category.

[170] *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 19, ¶ 501[01]. *See also Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319, 1357-59, 1628-44 (1976) (criticism of use of rulemaking power to modify the class action rule where the result may be major substantive impacts). The *Harvard Law Review* discussion illustrates well the complex relationship among

B. *Requirement of Public Deliberation*

Inherent in the concept of delegation is the notion that it will be exercised by the body receiving the power within the legislative tradition of open and public deliberation. The 1973 Commission on Standards of Judicial Administration of the American Bar Association specifically noted that appropriate procedure should involve "opportunity on the part of members of the public and the bar to suggest, review and make recommendations concerning proposed rules,"[174] and that "the participation of judges, lawyers, legal scholars, and legislators in deliberations concerning the rules, the provision of staff assistance for research and drafting, and circulation of proposals for scrutiny and comment before their adoption" are desirable.[175] Most states utilize expert advisory groups—often judicial con-

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various statutes and rules and the dangers involved when neither courts nor legislature take the initiative to resolve tangled substantive-procedural problems.

[171] Letter to the "Bench and Bar" from the Chairman and the Secretary of the Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States (Sept. 30, 1976).

[172] *Cf.* Dorszynski v. United States, 418 U.S. 424, 431 (1974) ("once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"). *But cf.* Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Advisory Comm. Note to Proposed Rule 35.1, at 5 (Sept. 1976) (finding rulemaking authority in present power of the courts of appeals to review sentences). If this rulemaking power exists, however, it is almost never utilized.

[173] *See, e.g.*, 18 U.S.C. § 3731 (1970); 28 U.S.C. § 1291 (1970); 28 U.S.C. § 2106 (1970).

[174] ABA Comm. on Standards of Judicial Administration, Standards Relating to Court Organization 63 (Tent. Draft 1973).

[175] *Id.* at 64. *See also, e.g.*, Sunderland, *supra* note 97, at 33.

ferences and councils[176]—to help draft statewide rules.[177] Such groups often provide an opportunity for the bar and other interested parties to suggest changes.[178] In addition, the effective date of new rules is usually set sufficiently far after promulgation to allow objections to be raised and hearings to be held.[179]

Typical of the operation of such an expert body was the work of the California Law Revision Commission in the adoption of the California Rules of Evidence. The Commission's task was to prepare drafts for consideration by the legislature. It drew assistance from law professors who prepared the necessary research studies and it provided for publication and wide discussion of its preliminary proposals before submitting them for legislative scrutiny.[180] The rules ultimately adopted by the legislature were the end result of this process.[181]

The work of the new York State Committee to Advise and Consult with the Judicial Conference on the CPLR provides another example of the manner in which a body of expertise is utilized in rulemaking.[182] The Committee, which reports to the New York Judicial Conference,[183] has modest appropriations with which it commissions studies by law professors on an ad hoc basis. The New York Civil Practice Law and Rules is subject to constant revision.[184] Under the New York practice, although statewide rules are promulgated by the Judicial Conference, subject to veto by the legislature, much of the initiative for drafting changes in the statutes as well as the rules comes from the Committee to Advise and Consult.[185] The system works fairly comfortably, although it would appear to be extremely awkward.

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[176] J. Parness & C. Korbakes, A Study of the Procedural Rule-Making Power in the United States, app. III (Am. Judicature Soc'y, Aug. 1973) (mimeograph).

[177] A. Vanderbilt, Minimum Standards of Judicial Administration 128-29 (1949).

[178] Advisory Comm. on Practice & Procedure, Third Preliminary Report, N.Y. Leg. Doc. No. 17, at 833 n.41 (1959).

[179] The probability of obtaining a change after promulgation, however, like the chance of securing a rehearing, is slight because of the reluctance of most courts to acknowledge their errors.

[180] California Law Revision Comm'n, Recommendation Proposing an Evidence Code 3-8 (1965).

[181] *Id.* at 3-4 (1965). *See generally* 6 California Law Revision Comm'n, Reports, Recommendations and Studies 1962-1964; California Law Revision Comm'n, Recommendation Proposing an Evidence Code (1965). *See also* B. Witkin, California Evidence §§ 5-6 (2d ed. 1966).

An instructive contrast to the operation of the California Law Revision Commission is seen in the functioning of the California Judicial Council, which has some limited power to make procedural rules. *See* B. Witkin, 1 California Procedure §§ 119-20, 52-53, 126-31 (2d ed. 1970). The Council apparently does not publish its rules in advance of adoption to permit criticism—a failing which has been a source of irritation to the bar. *Id.*

[182] Administrative Board of the Judicial Conference of the State of New York, 19 Ann. Rep. A-27, Leg. Doc. No. 90 (1974).

[183] The New York Judicial Conference consists of the chief judge of the New York State Court of Appeals as chairman, the four presiding justices—one from each of the four departments, and judges representing the Surrogates Courts, County Courts, Court of Claims, Family Court, Criminal Court of the City of New York and Civil Court of the City of New York. The following ex-officio members by statute attend meetings of the Conference and make recommendations: the Chairman and the ranking minority member of the Judiciary Committees of the Senate and of the Assembly and the Chairman and ranking minority member of the Codes Committees of the Senate and Assembly. The State Administrator, who acts as Secretary, is assisted by the counsel, administration officer and extensive staff. Administrative Board of the Judicial Conference of the State of New York, 16 Ann. Rep. 9-10, A-2 to A-11, Leg. Doc. No. 90 (1971).

[184] *See, e.g.*, Judicial Conference of the State of New York, Report to the 1976 Legislature in Relation to the Civil Practice Law and Rules and Proposed Amendments

Recognition that judicial rulemaking must be a public process is healthy. When courts assume a legislative role, they also should exercise the restraints that properly accompany that role. Public deliberations are a basic safeguard to insure that the legislative process is fair and informed. Professors Leo Levin and Anthony Amsterdam have summarized the position well:

> The whole aim of the balance of powers . . . is the creation of a scheme whereby the courts may maintain an effective, flexible and thorough-going control over their own administration and procedure, with the possibility of ultimate legislative review in cases where important decisions of public policy are necessarily involved. This is the aim of safe efficiency: immediately practical, fundamentally democratic.[186]

C. *Possible Supreme Court as Delegee of the Rulemaking Power*

If delegation is possible and desirable, to whom may the power of rulemaking be delegated? The delegee should be chosen in a way that makes institutional sense, that seems meet in an historical framework, and that does no violence to our conceptions of separation of powers. From what has already been said, it is obvious that the Supreme Court and the individual lower courts could properly be delegated the responsibility of rulemaking. So, too, could an assembly of judges such as the United States Judicial Conference, or a committee appointed by judges and approved by Congress. While Congress has great latitude in delegating power, however, it cannot ignore the proper separation of roles of the executive, legislature, and courts.[187] It would, for example, seem improper today to delegate rulemaking power to the President or even to an executive agency such as the Department of Justice.

While it is clearly possible for Congress to delegate primary responsi-

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Adopted Pursuant to Section 229 of the Judiciary Law (Feb. 1, 1976) (mimeograph) (studies and recommendations on, *inter alia*, notice of claim, attachment, replevin, arrest, and receivership; videotaping depositions; direct actions against liability insurance carriers).

[185] Advice to the Judicial Conference is given by the Committee to Advise and Consult with the Judicial Conference on the C.P.L.R., consisting of leading members of the bar and law teaching profession. The recommendations of this group are based upon extensive studies, usually prepared by law professors. Its recommendations are generally followed by the Conference in amendments to the rules of the C.P.L.R. and, often, by the legislature in proposals to amend sections of the C.P.L.R. and related statutes. *See, e.g.*, ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, 16 ANN. REP. A-28 to A-49, LEG. DOC. NO. 90 (1971).

[186] Levin & Amsterdam, *supra* note 119, at 42.

[187] *See* Buckley v. Valeo, 424 U.S. 1, 120-24 (1976).

bility for rulemaking to the Supreme Court, certain practical objections of considerable persuasiveness have been raised concerning such delegation. These will be considered in the following section.

D. *Practical Objections to the Exercise of Rulemaking Power by the Supreme Court*

In 1944 Justice Frankfurter opposed the adoption of the Federal Rules of Criminal Procedure on the ground that the Supreme Court would be unable to evaluate them effectively in view of its distance from the realities of day-to-day district court trial proceedings.[188] He also believed that it was undesirable for the Court to appear, through the issuance of rules, to prejudge issues that might come before it in litigation.[189] Justice Black also opposed, but without explanation, the adoption of the Federal Rules of Criminal Procedure. Justices Black and Douglas objected not only to particular sets of rules, but to the rulemaking process in general.[190] In opposing the 1963 amendments to the Federal Rules of Civil Procedure and recommending that rulemaking be carried out by the Judicial Conference, they stated:

> We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our

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[188] Rules of Criminal Procedure, Order, 323 U.S. 821, 822 (1944) (memorandum of Frankfurter, J.).

In general, the changes made by the Supreme Court in the Rules forwarded to it have been miniscule. Perhaps the best known of the Court's infrequent modifications was the elimination of the work product rule proposed in 1946 by the Advisory Committee on the Civil Rules. *See* 4 Moore's Federal Practice ¶ 26.63[6], at 26-383 (2d ed. 1976). Since the issue was posed by a case pending before it, "the Court declined to adopt the amendment, preferring to handle the matter by decision." *id.* at 26-386, in Hickman v. Taylor, 329 U.S. 495 (1947). The *Hickman* doctrine was ultimately embodied in Rule 26(b) of the Federal Rules of Civil Procedure by the 1970 amendments. *See* 8 Wright & Miller, Federal Practice and Procedure: Civil §§ 2022, 2023 (1970).

Another significant modification effected by the Court occurred in connection with its action on the Federal Rules of Evidence. It was assumed by members of the Advisory Committee on Evidence that the major reason the Court returned for further study the first proposals for the new Rules of Evidence transmitted to it by the Judicial Conference was that it was evenly split on the definition of a "representative of the client" in the area of attorney-client privilege. This split was reflected in its inability either to adopt or to reject the definition in Harper & Row, Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd by equally divided court*, 400 U.S. 348 (1971), which rejected the restrictive "control group" test. See the history of the provision in 2 J. Weinstein & M. Berger, *supra* note 19, ¶ 503[01], at 503-14 and ¶ 503(b)[04], at 503-44. The next version forwarded to the Supreme Court and the one adopted by it omitted this definition. *Id.* There were, of course, many other changes in the new draft.

In the areas both of work product and privilege, contemporaneous litigation had apparently sharpened the Court's awareness of the subtleties involved, making it less eager to adopt categorical rules.

[189] Rules of Criminal Procedure, Order, 323 U.S. 821, 822 (1944).

[190] *See, e.g.*, 368 U.S. 1012 (1961) (amendments to Fed. R. Civ. P.); 374 U.S. 865 (1963) (amendments to Fed. R. Civ. P.) (statement of Black and Douglas, JJ.); 383 U.S. 1031, 1032 (1966) (amendments to Fed. R. Civ. P.) (Black, J., dissenting); 383 U.S. 1089 (1966) (amendments to Fed. R. Crim. P.) (Douglas, J., dissenting in part); 398 U.S. 979 (1970) (amendments to Fed. R. Civ. P.); 401 U.S. 1019 (1971) (amendments to Fed. R. Civ. P., Fed. R. Crim. P., Fed. R. App. P.).

> judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by the mere failure of the Congress to reject proposals of an outside agency. . . .
>
> . . . .
>
> Instead of recommending change to the present rules, we recommend that the statute authorizing this Court to prescribe Rules of Civil Procedure, if it is to remain a law, be amended to place the responsibility upon the Judicial Conference rather than upon this Court. . . . It is . . . [the Conference and its Committees] who do the work, not we, and the rules have only our imprimatur. . . . Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid.[191]

In response to Justices Frankfurter, Douglas, and Black, the Supreme Court maintained that "[t]he fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency."[192] The argument that the Court remains completely free in fact to reconsider judicially the rules it has adopted legislatively is not supported by the history of judicial review of rules.

In *Hanna v. Plumer*,[193] for example, the Court was called upon to determine whether Rule 4(d)(1) of the Federal Rules of Civil Procedure, as applied in a diversity action, ran afoul of the Constitution, the Enabling Act, or the holding of *Erie v. Tompkins*.[194] The Court, in upholding the validity of the rule against these challenges, relied in large part upon the bootstrap argument that adoption of the rule by the Court, and acquiescence by Congress, had created a presumption of validity:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[195]

The central issue posed by the case, however—whether Rule 4(d)(1) is substantive or procedural for purposes of *Erie* and of the Enabling Act—had never been considered by the Court or Congress in the context of a concrete fact situation during the course of the rulemaking process. Thus, the Court's bootstrapping hardly measured up to the level of neutral analysis that should be expected of the Supreme Court; the Court had, in effect, legislatively predetermined the issue by adopting the rule.

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[191] 374 U.S. at 865-66, 869-70 (amendments to FED. R. CIV. P.) (statement of Black and Douglas, JJ.).

[192] Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946).

[193] 380 U.S. 460 (1965).

[194] 304 U.S. 64 (1938).

[195] 380 U.S. at 471.

Hart and Wechsler summarize this dilemma by commenting that, "[t]o a significant extent, *Hanna* remits important *Erie* issues from the Court as a decider of cases to the Court (and its advisers) as a promulgator of rules."[196] The Court, then, may have taken a position on *Erie* issues which, as Justice Harlan points out in his concurrence in *Hanna*, involve constitutional questions basic to the federal system,[197] with neither the traditional legislative nor adjudicative safeguards. It may legitimately be asked whether the result in *Hanna* would have been the same if a district court had adopted the rule and the Supreme Court's own power, prestige and wisdom had not been at stake.[198]

The secrecy which normally enshrouds the deliberations of the Supreme Court has given rise to another objection to its role in rulemaking. The legitimacy of rules, like that of any legislation, stems in large part from public access to the reasoning of the decision-makers; the Court's secrecy poses a threat to this legitimacy. An example of the problem occurred when the Court modified the informer privilege provided under the Federal Rules of Evidence so as to favor the government's position.[199] The failure of the Court to offer any explanation for the change did nothing to allay the suspicions of some that it had been influenced by the Attorney General's views, which had not been fully accepted by the Advisory Committee.[200] The impenetrability of the Court's decisionmaking process contrasts with the openness of congressional procedures, under which hearings, reports and floor debates generally permit the reasons for important changes to be inferred, even if they are not explicit.

A third, and potentially quite serious, objection to rulemaking by the Court concerns the dangers posed by congressional criticism of Court-made rules. Such criticism creates an unnecessary conflict between the Court and Congress and reduces the Court's prestige and reputation for unbiased independence.

Finally, the flexibility of the Supreme Court in balancing a variety of constitutional, statutory and other factors is inhibited by its having adopted rules. The point is illustrated by Chief Judge Lumbard's forceful argument that extrajudicial rulemaking rather than the *Miranda* decision (in effect a set of Court-made rules) should have dealt with in-custody interrogation.[201] He argued: rules rather than a constitutionally-based decision might have been amended more easily; some experimentation with other techniques was desirable, and rules would have permitted this; rulemaking would have permitted full consideration of the views of other federal and state judges, members of the bar, law enforcement officers and others; the American Law Institute's then eighteen-month-old drafting project on a pre-arraignment code could have provided a more sophisticated draft covering more of "the many problems which follow in the wake of so complete a break with the past;"[202] and promulgation with an effective date in the future could have eliminated the problem of frustrating prosecutions in process.

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[196] Hart & Wechsler, *supra* note 50, at 748.

[197] 380 U.S. at 474 (Harlan, J., concurring).

[198] *See generally* 2 J. Weinstein & M. Berger, *supra* note 19, ¶ 501[01].

Hanna was strongly relied upon by the Advisory Committee in charge of drafting the Federal Rules of Evidence, and many commentators concluded that the Court could do whatever it wished in adopting these rules. Advisory Committee Note to Rule 501, in *id.* *Hanna*'s force has not been reduced by congressional revision of the Federal Rules of Evidence to eliminate rules of privilege. Congress did not overrule *Hanna*; it merely determined, on policy grounds, that rules of privilege should not be adopted through rulemaking at this time.

[199] 2 J. Weinstein & M. Berger, *supra* note 19, ¶ 510[01].

[200] *Id.*, ¶ 510[01], at 510-17 to 510-18, ¶ 510[06], ¶ 510[07].

All the advantages cited by Judge Lumbard would accrue if the rules were adopted by another judicial agency, with the Supreme Court retaining the right to depart from such rules where it believed the Constitution required different state standards, or where congressional statutes or the Court's power to control lower federal courts required modifications to meet special problems not foreseen or adequately dealt with by the rulemakers. The Court would not be inhibited in criticizing such rules since it did not promulgate them. The Court's input into the complex of lawmaking through adjudication could be reflected in subsequent amendments to the rules. The Court would thus stand above and apart from lawmaking, doing what it does best: considering a complex of constitutional provisions, statutory amendments, rules prior decisions and changing societal and institutional needs in the context of particular problems presented in an adversarial setting. When, in contrast, the Court adopts rules almost blindly—as it must—the risk is considerable that it will needlessly sap two of its great institutional strengths—flexibility and dispassionate decision-making.

To summarize, at the present time the disadvantages to Supreme Court rulemaking seem to outweigh the advantages. First, since the members of the Court have less actual experience with details of lower court practice than any other judges, their judgment in such matters is apt to be less reliable; therefore they must, in the main, follow recommendations made to them. Second, the Court's prior adoption of rules substantially reduces its ability to evaluate independently whether such rules are consistent with federal statutes and with the Constitution when these issues are raised on appeal. As a result, important issues do not receive the constitutional scrutiny they merit. Third, where rules adopted by the Court are later rejected by Congress—as were the privilege provisions in the Proposed Rules of Evidence[203]—the Court has, in effect, rendered an advisory opinion which will inevitably guide the lower courts, thus departing unnecessarily from theoretical judicial doctrine. Finally, congressional criticism of the Court's exercise of rulemaking power is costly to the Court as an institution.[204]

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[201] Lumbard, Criminal Justice and the Rule-Making Power, Address to Conference of Chief Justices in Honolulu (Aug. 3, 1967) (mimeograph).

[202] *Id.* at 9.

The underlying point remains that the Supreme Court as a body has never challenged Congress' ultimate authority over rulemaking, even though the execution of this function has increasingly fallen to the courts. Historical precedent also makes it clear that Congress has the power to modify the way rulemaking is carried out. Since practical rather than ideological considerations have determined rulemaking procedures, Congress and the courts should not hesitate to consider further modifications in the process. No tradition or vested interest prevents a fresh look at the matter; the primary considerations that should dictate the nature of changes are practical ones.

E. *Proposals for Modifying the National Rulemaking Process*

The current American solution to the placement of rulemaking power resembles the British solution:[205] authority is balanced between legislative and judicial branches, with fundamental responsibility delegated to a judicial offshoot, the Judicial Conference (and its attendant advisory committees). The Conference draft is theoretically subject to revisions by the Supreme Court, and Congress reserves power to set aside or revamp any provisions. This is a relatively recent division of responsibilities and has worked fairly well, although it shows some signs of weakness.

What is plain from the discussion to this point is that there are serious problems with present rulemaking procedure. Professor Lesnick has summarized special areas of concern:

> —The lack of sufficiently widespread input by all segments of the legal profession and by the public, as a result of the procedures by which the Judicial Conference and the advisory committees reporting to it draft rules and recommend them to the Supreme Court.
>
> —The relative unrepresentativeness of the advisory committees and the excessive centralization of authority in a single individual, the chief justice.
>
> —The inappropriateness of utilization of the Supreme Court as the official promulgator of the rules.
>
> —The lack of a meaningful mode of congressional review that does not undermine the rulemaking process itself.[206]

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[203] *See* text accompanying note 170 *supra*.

[204] *See also* Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974) (criticism by former Justice Goldberg).

[205] *See* note 37 *supra*.

[206] Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A.J. 579-80 (1975). For further discussion, see *Hearings on Proposed Amendments to*

Lesnick's first three recommendations for change[207] based on his critique are generally quite sound:

> 1. Judicial Conference procedures should be made more open and should be published.
> 2. The composition of the advisory committees should be more representative. . . .[208]
> 3. The assignment of a rule-promulgating role to the Supreme Court is unwise and inappropriate and should be re-examined.

Professor Lesnick also makes a number of suggestions regarding Congress' role in rulemaking. At present, rules of evidence do not take effect until one hundred and eighty days after they have been reported by the Chief Justice.[209] Either house may reject or defer an amendment.[210] Any amendment "creating, abolishing, or modifying a privilege," must be approved by an act of Congress and thus must go to the President for signature.[211] Other rules become effective ninety days after being reported to Congress and require an act of Congress for deferral or modification,[212] except that criminal rules on "Procedure after verdict" need not be reported to Congress.[213] There is no persuasive reason why all this national rulemaking power should not be exercised in the same way and be subject to the same control by Congress.

Some of Professor Lesnick's suggestions would help to achieve that end. He would double the ninety-day period of delay to permit Congress a more realistic amount of time to consider the rules.[214] Congress needs more time than it now has for review of rules; yet it is still desirable to place some limit on the period so that necessary changes will not be put off indefinitely while Congress addresses itself to more pressing matters. Moreover, Professor Lesnick is on firm ground in objecting to the fact that one house alone may block changes. This creates "a real danger . . . of a prolonged stalemate. . . ."[215]

Professor Lesnick's last point seems more doubtful if it implies de-

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Federal Rules of Criminal Procedure Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 197-209 (1974) (statement by H. Lesnick on behalf of Washington Council of Lawyers) [hereinafter cited as *Criminal Procedure Hearings*].

[207] Lesnick, *supra* note 206, at 580-83.

[208] The further point that Professor Lesnick makes, that "the appropriateness of the extreme centralization of authority in the chief justice should be examined," seems more doubtful. The present Chief Justice, Warren Burger, has devoted an enormous amount of energy to improving judicial administration. The author's observations of his work in a number of committees and at various official meetings suggests that the Chief Justice's leadership role has been useful and that this aspect of his work should not be limited. *See* Weinstein, *The Role of the Chief Judge in a Modern System of Justice*, 28 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 291 (1973).

[209] 28 U.S.C. § 2076 (Supp. V 1975).

[210] *Id.*

[211] *Id. See* 5 J. WEINSTEIN & M. BERGER, *supra* note 19, at 1102-4 to 1102-13 for the history of this provision.

[212] 18 U.S.C. § 3771 (1970); 28 U.S.C. §§ 2072, 2075 (1970).

[213] 18 U.S.C. § 3772 (1970).

[214] Lesnick, *supra* note 206, at 583 (1975).

[215] *Id.* at 584.

tailed congressional revision of all proposed rules: "A workable mode of genuine congressional review needs to be devised."[216]

Generally, the author believes that review by Congress should avoid attention to procedural details of court practice.[217] So long as the rules themselves are adopted by a judicial body with full legislative protections, including public participation in hearings, full notice of all changes, and adequate justification of rulemaking decisions,[218] there is no need to repeat hearings or to delay needed improvements in court practice. If a matter becomes important enough for detailed congressional intervention, legislation is probably desirable, with formal participation by both houses and the President.[219]

The present Chief Justice of the United States apparently favors more effective coordination between the advisory committees, the Supreme Court and congressional committees in the drafting of proposed rules.[220] The author does not care for the suggestion that all three branches of government participate in detailed drafting of the rules, through an independent commission or otherwise.[221] The legislature is sufficiently involved by passing on the rules after they are proposed to it; if Congress were to participate in the original drafting it might become too committed to a draft to exercise its power of review impartially. The executive branch need not be involved. It has sufficient input through memoranda and appearances by its representatives, particularly the Department of Justice. If there is a bill to delay or modify the rules, the President will have his usual veto power. Ad hoc independent commissions are not useful in solving on-going problems of rule revision.

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[216] *Id.* at 583.

[217] *See also* Hungate, *supra* note 16, at 1207 ("we should accord a healthy respect to any amendment proposed by the Supreme Court."). For an attack and defense of congressional action in the field of evidence, *compare* Copeland, *Who's Making the Rules Around Here Anyway?*, 62 A.B.A.J. 663 (1976) *with* Dennis, *We're Making the Rules*, 62 A.B.A.J. 1072 (1976).

[218] *See, e.g., Evidence Hearings, supra* note 8, at 168 (statement of C.R. Halpern and G. T. Frampton, Jr.); *Criminal Procedure Hearings, supra* note 206, at 203 (statement of H. Lesnick).

[219] An example is the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (Supp. V, 1975), Pub. L. No. 93-619, adopted after Rule 50(b) of the Federal Rules of Criminal Procedure had dealt with the same problem. The Act is discussed in connection with local rules at notes 266-71 and accompanying text *infra.* Since no speedy trial rule will work unless the courts are granted the personnel to make the rule a reality, congressional expression on the policy of speedy trials was desirable. It is noteworthy, however, that while Congress was quick to embrace the concept of speedy trials, it has been slow to supply the new judges needed to effectuate the policy.

[220] Judge Thomsen, in presenting to the House subcommittee the proposed amendments to the new criminal rules, conveyed this message:

> I am authorized to say that the Chief Justice, as well as members of the standing committee, believe it would be wise to have a closer relationship with members of the appropriate congressional committees while proposed rules are being discussed by the several advisory committees and by the standing committee of the Judicial Conference. Perhaps a member of your committee and a member of the appropriate Senate Committee, or someone from your respective staffs, might serve as members of the standing committee and of each of the advisory committees, or might attend meetings of those committees and comment on each proposal, as a representative of the Department of Justice sometimes is asked to do. . . .

Criminal Procedure Hearings, supra note 206, at 5.

Mr. Hungate, the Chairman, responded in part:

> We will certainly call to the attention of Chairman Rodino your suggestions concerning the possibility of a closer liaison between the Congress and the Judicial Conference.
>
> If I might interject at this point, I suppose that what happens with the rules of evidence will influence the nature of the liaison. If nothing happens, and nothing happens by the first of next August, we may have learned a lesson—Congress is indeed not capable to deal with these problems. I should point out however, that until recently the Congress has, more or less by default, let slide a responsibility that does belong to it.

Id. at 6.

[221] In support of the suggestion of an independent commission, *see Criminal Procedure Hearings, supra* note 206, at 207; Lesnick, *supra* note 206, at 583.

Another option would be to make the Judicial Conference of the United States the active drafter and adopter of rules. This combined role would probably not be desirable.[222] The Conference is a rather unwieldy body, heavily dominated by the Chief Justice of the United States who appoints its committees. Its controlling members are the chief judges of the courts of appeals, who achieve their status through seniority, and representatives elected by the district judges of the circuits, who serve for a short time and whose influence is transient.[223]

What this body is ideally suited for, however, is the function now performed by the Supreme Court. It can do this job better than the Court, since its members are more familiar with current practice problems than are the Supreme Court Justices. Furthermore, shifting this function to the Conference would obviate the present danger to the Court's independent judgment when a rule is challenged before the Court.

Under this plan, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States would be given legislative recognition as the body which will directly, and through its advisory committees, make necesseary studies, announce proposed changes, hold public hearings, draft rules, and justify changes. Its recommendations would then be passed upon by the Judicial Conference (taking the place of the Supreme Court). Congress should have a veto power if both houses act within one hundred and eighty days.

As a practical matter, there is now strong psychological pressure on individual advisory committee members to modify the rules as they think the Chief Justice would wish. It is the Chief Justice, after all, who appointed them. Moreover, his good will is required because as chairman of the Judicial Conference and as Chief Justice he will help shepherd the rules through the Conference and the Court and will have the necessary power and contacts to have an impact on Congress.

Much depends, of course, upon the interests and personality of the Chief Justice. His positive interest in improving practice is healthy.

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[222] Clark, *supra* note 103, at 256-57.

[223] *Cf.* Oliver, *Reflections on the History of Circuit Judicial Councils and Circuit Judicial Conferences*, 64 F.R.D. 201, 212 (1975) ("[I]f effective and innovative procedures are ever to be designed for the improvement of the administration of justice on the trial court level, the suggestions for improvement will more likely come from trial judges and the trial Bar than from any other source.").

Eliminating the Supreme Court's role would reduce his power somewhat, but probably not appreciably. As chairman of the Judicial Conference he would undoubtedly continue to have a great deal of influence, and properly so.

Members of the Standing Committee should be appointed by the Judicial Conference. Practically this will mean appointment by a nominating committee dominated by the Chief Justice. While it would be possible to subject the appointment of members of the Standing Committee or of its chairman to confirmation by the Senate,[224] there would be no advantage in such confirmation; these offices should not be politicized. There seems to be no reason to challenge the power of the Judicial Conference to appoint a Standing or other committee to prepare drafts of rules. As already noted, the Conference has exercised power under grant of Congress to study the rules. Its existing Standing Committee has proposed the rules and amendments to the Supreme Court using the Conference as a conduit. While clause 2 of section 2 of Article II of the Constitution permits Congress to "vest the Appointment of . . . inferior Officers . . . in the *Courts of Law*,"[225] there is no reason why a committee representing all the courts, such as the Judicial Conference, should not exercise the same power in this respect as any particular "court." All the members of the Judicial Conference have been appointed by the President and confirmed by the Senate as judges. Thus, authorizing the Conference to appoint rulemaking committees would merely give these judges additional duties consistent with those already being exercised. These are not "executive or administrative duties of a nonjudicial nature [which may] not be imposed on judges holding office under [article] III of the Constitution."[226]

The term of each member of the Standing Committee might be five years, with terms staggered. There might be a set ratio of, say, four judges, two of them appellate and two of them trial judges, at least two law professors, and at least four practitioners.

It is questionable whether there should be ex-officio members of the Standing Committee. It might be useful to have a designee of the American Bar Association who was actively involved in considering proposed changes in the federal rules for that group. Another ex-officio member might well be a representative of the Legal Services Corporation, which has recently been organized by the federal government to coordinate legal services to the poor. Ex-officio appointments, however, may lead to mediocrity since organizations tend to designate for honorific reasons. On balance, the Chief Justice and Judicial Conference can be trusted to provide representation from minority groups. Moreover, open hearings during earlier stages of rulemaking will permit broad participation in the process.

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[224] For a discussion of the appointment power and congressional power to delegate the power to courts of law, see Buckley v. Valeo, 424 U.S. 1, 124-27 (1976).

[225] Emphasis added.

[226] Buckley v. Valeo, 424 U.S. 1, 123 (1976).

Using the United States Judicial Conference to appoint Standing Committee members will work well since the district court judges who are Conference members know persons active in practice and are in a good position to suggest candidates. Whether the Standing Committee or the Conference appoints advisory committees, and who should appoint reporters and subreporters, are details that should be left to the decision of the Judicial Conference.

The Judicial Conference will probably undertake little more revision of the proposals presented to it than the Supreme Court has done. Nevertheless, allowing the Judicial Conference to take the place of the Court in adopting rules will enable new rules to benefit from judicial imprimatur, while averting the problem of subsequent court bias in litigation challenging such rules. There is a definite value in the approval of the federal judges sitting as a group. The rules are more likely to be accepted by the bench, the bar, and the individual states in view of the prestige of such a group.

Of course, it is not possible to prevent Congress from being active in rulemaking if it chooses to be. The level of its activity is largely a function of the personalities of the chairperson and the members of the Judiciary Committee and subcommittees. It would be helpful, however, if Congress recognized that it should restrict itself primarily to consideration of the larger policy issues, rather than involve itself in the details of rulemaking.

The rulemaking process should be "both fair and feasible"[227]; thus, the Standing Committee should be required to hold public hearings. The experience of federal agencies in rulemaking is useful in this regard, even if not decisive.[228] There is no reason why the courts should enjoy more relaxed standards for their own rulemaking than they require of administrative agencies. Since important legislative considerations are involved, a full oral hearing, not merely the right to submit written statements, should be afforded.[229] The congressional hearings held in connection with the Federal Rules of Evidence furnish a satisfactory model.

Congressman Hungate, who had primary responsibility for guiding both the Rules of Evidence and recent amendments to the Rules of Criminal Procedure through Congress, has concluded from his experience that the time may now be ripe for Congress to re-examine the national rulemaking process.[230] The author strongly concurs in that view.

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[227] Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1315 (1975).

[228] *Id.* at 1272-73, 1305-15.

[229] *But cf.* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973) (in absence of express congressional requirement, the Administrative Procedure Act does not require full oral hearing where the administrative agency is engaged in rulemaking, rather than in adjudicatory functions).

[230] Hungate, *supra* note 16, at 1207.

V. LOCAL COURT RULES, GUIDELINES AND DIRECTIVES, AND INDIVIDUAL JUDGE'S RULES

A. *Local Rules*

Individual federal courts have had rulemaking power from their inception. The Act of March 2, 1793[231] provided:

> That it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings. . . .[232]

The Conformity Act, however, by requiring state practice to be followed, severely restricted the exercise of this power.[233]

Today, authority for promulgating local rules is most often found in section 2071 of title 28 of the United States Code and Rule 83 of the Federal Rules of Civil Procedure.[234] Section 2071 provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court,[235]

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[231] Ch. 22, § 7, 1 Stat. 335.

[232] Other early statutes recognized a discretionary rulemaking power of the federal courts. *See, e.g.*, Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276; Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83. Such grants of power have been recognized as constitutional. *See* Cooke v. Avery, 147 U.S. 375, 386-87 (1893); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41-42 (1825). Later cases asserted the existence of a wide discretion in federal courts to set their own rules if necessary for "the advancement of justice and the prevention of delay in proceedings." Shepard v. Adams, 168 U.S. 618, 625 (1898). *See also* The Columbia, 100 F. 890, 894 (E.D.N.Y. 1900) (admiralty). For a discussion of the history of local rulemaking power, see Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1253-54 (1967) [hereinafter referred to as *Rule 83 Note*].

[233] *See, e.g.*, Chisholm v. Gilmer, 299 U.S. 99 (1936); Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

[234] *See* In Re Sutter, No. 76-1194, at 185-93 (2d Cir., Oct. 20, 1976) (holding valid local rule, "[w]hether grounded upon the inherent power of the court or upon rulemaking power conferred by 28 U.S.C. § 2071," under which attorney was fined $1500 "costs" for recklessness in delaying trial). *But cf.* Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 732 (3d Cir.) (en banc), *cert. denied*, 371 U.S. 888 (1962) ("[T]he local rule making power, while not limited to the trivial, cannot extend to basic disciplinary innovations requiring a uniform approach. Whether an attorney should be himself fined when, because of office oversight or neglect, he is late in complying with an order of the court is a substantial independent question which calls for mature consideration by the body charged with making Rule recommendations, the Supreme Court's advisory committee."), *criticized in* Comment, *Sanctions at Pretrial Stages*, 72 YALE L.J. 819, 830 (1963).

[235] 28 U.S.C. § 2071 (1970). *See also* such specific grants as 28 U.S.C. §§ 137, 139-41, 751-54, 1654, 1863(b), 1914(c) (1970) and the Speedy Trial Act, 18 U.S.C. § 3165 (Supp. V, 1975).

while Rule 83 of the Federal Rules of Civil Procedure states:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules . . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.[236]

Inherent power has also been relied upon.[237]

Lower state courts in this country also generally have power to make rules governing local practice. Federal and state local rulemaking are similar in that rulemaking procedure is not ordinarily prescribed by statute or rule. In a few states the lower courts must certify their rules to the higher courts before they become effective.[238] Sometimes there is informal discussion with members of the bar and, less frequently, publication before adoption. Generally, however, the lower courts adopt rules without any systematic consultation or advance publication. Often, local rules are not kept up to date nor codified and are apparently difficult to find.[239]

One of the few thoughtful examinations of local federal rules suggests that they are a "maze of decentralized directives, encumbered by trivia and often devoid of explanation."[240] The *Duke Law Journal* has analyzed local rules under the following headings, which give some idea of the range of practices affected:[241]

1. Attorneys
2. Divisions within a District
3. Calendars and Motions
4. Pleadings
5. Notifications of a Claim of Unconstitutionality
6. Orders Grantable by the Clerk
7. Bonds and Undertakings
8. Depositions and Discovery
9. Pre-trial
10. Stipulations
11. Continuances
12. Dismissal for Want of Prosecution
13. Trial Conduct and Procedure

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[236] Fed. R. Civ. P. .83. *See also* the specific grants in Fed. R. Civ. P. 16, 40, 66, 78; Fed. R. App. P. 47; Fed. R. Crim. P. 57(a), 50(b) (requiring adoption of local speedy trial rules).

[237] *See, e.g.*, United States v. Furey, 514 F.2d 1098, 1103 (2d Cir. 1975) (speedy trial rule in criminal cases); Shotkin v. Westinghouse Elec. & Mfg. Co., 169 F.2d 825, 826 (10th Cir. 1948) (power to dismiss for want of prosecution).

[238] *See, e.g.*, Ky. Rev. Stat. Ann. § 24.065 (Baldwin 1970); Mass. Ann. Laws c. 215, § 30 (Michie/Law. Co-op. 1974) (probate courts); Ohio Rev. Code Ann. § 2505.45 (Baldwin 1971); W. Va. R. Civ. P. 83 (1967).

[239] In Doran v. United States, 475 F.2d 742, 743 (1st Cir. 1973) (per curiam), for example, there is a discussion of the need for keeping the local rules up-to-date and for arranging for their distribution.

[240] Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 Duke L.J. 1011, 1012 [hereinafter cited as *Local Rules Comment*]. *See Rule 83 Note, supra* note 232.

[241] *Local Rules Comment, supra* note 240, at 1013.

14. Impartial Medical Examinations and Testimony
15. Exhibits, Records, and Files
16. Juries: Empaneling and Instructions
17. Costs and Fees
18. Motions for New Trials
19. Appeals
20. Bankruptcy and Receivership
21. Habeas Corpus Procedure

Even this broad-ranging categorization does not complete the picture.[242]

Another comprehensive examination of local rules has concluded that

> the majority of district courts have, in promulgating rules, ignored the principles of simplicity . . . and uniformity which guided the formulation of the Federal Rules. At times, district courts have used their power under Rule 83 to negate specific requirements of the Federal Rules; more often, simply to escape from the arduous but essential task of case-by-case analysis.[243]

As some of the discussion below indicates, the subject matter of local rulemaking continues to expand as local judges exercise their fertile imaginations in dealing with perceived problems.

Summarized, the case law, statutes and rules provide that the district courts may not formulate rules which are: "(1) Inconsistent with the Federal Rules, (2) Inconsistent with Federal Statutes, (3) Unreasonable, (4) Non-uniform and discriminatory."[244] Nevertheless, control of local rulemaking power has been relatively ineffective.

One method of limiting local rulemaking is to require reports. Rule 83 of the Federal Rules of Civil Procedure mandates that local rules authorized thereunder "shall upon their promulgation be furnished to the Supreme Court of the United States."[245] Other local rules, promulgated pursuant to Rule 47 of the Rules of Appellate Procedure, Rule 927 of the Bankruptcy Rules and Rule 57 of the Rules of Criminal Procedure, are filed with the Administrative Office of the United States Courts, which was established after Rule 83 of the Federal Rules of Civil Procedure had been adopted. Only Rule 927 of the Bankruptcy Rules requires making the local rules "available to members of the Public who may request them."[246]

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[242] There are also rules which, *inter alia*, limit the right to appear pro se in civil rights cases, *see* M.D. ALA. R. 1; provide for six-member juries in civil cases, *see, e.g.*, M.D. ALA. R. 1; forbid certain communications in class actions, *see, e.g.*, S.D. TEX. R. 6; provide for expert panels, *see* W.D. MO. R. 23; outlaw use of photography, radio and television in environs of courthouse, M.D. PA. R. 101.16; require special forms of pleading and procedure in class actions, S.D.N.Y. R. 11A; require use of certain forms in pro se habeas corpus actions, W.D. OKLA. R. 5; and mandate separate trials for liability and damages, *see* Weinstein, *Routine Bifurcation of Jury Negligence Trial: An Example of the Questionable Use of Rule Making*, 14 VAND. L. REV. 831 (1961). For a further collection of practices regulated by local rules, see 12 WRIGHT & MILLER, *supra* note 188, § 3154.

[243] *Rule 83 Note, supra* note 232, at 1251-52.

[244] *Local Rules Comment, supra* note 240, at 1011 n.4 (citations and emphasis omitted). For a collection of cases in which local district court rules were declared invalid and in conflict with Rule 83, see 7 MOORE'S FEDERAL PRACTICE ¶ 83.03, at 83-4 (2d ed. 1976); *see also* 43 FORDHAM L. REV. 1086, 1096 nn.78 & 79 (1975).

[245] FED. R. CIV. P. 83.

This reporting system provides no control at all.[247] Filing does not imply approval by the Supreme Court or by the Administrative Office.[248] Nor does central filing give effective notice to the public. While there is an unofficial service collecting all civil, general and admiralty rules,[249] it does not include the local rules which affect criminal matters. There is no simple way for an attorney to obtain all local criminal rules. Nevertheless, an attack on a local rule on the ground that a copy was not sent to the Supreme Court or to the Administrative Office would seem to have little chance of success. As a result of these deficiencies, lack of familiarity with local rules may become a trap for unwary lawyers from other districts.[250]

A second method of control is through appeals in individual cases.[251] In most instances, however, the finality rule, limiting appeals from nondispositive orders, precludes interlocutory appeals challenging local rules. Moreover, local bar associations as well as attorneys have been reluctant to cross swords with local judges by formally challenging their rules.[252] The apathy of the bar also impedes challenge.[253]

On rare occasions the bar summons its courage to protest alleged overstepping by judges in rulemaking. An example is *Chicago Council of Lawyers v. Bauer*,[254] where the Seventh Circuit declared invalid, on the ground of overbreadth, restrictions on the comments of lawyers about pending litigation. Treating the rules essentially as a prior restraint statute, and using normal statutory construction techniques, the court concluded that amendment to provide somewhat narrower free press-fair trial rules was advisable.[255]

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[246] *See* Bankruptcy Rules and Official Bankruptcy Forms, U.S.C.A. (West Pamph. 1975). The arrangements for public distribution are subject to the approval of the Director of Administration of the United States District Courts.

[247] Communications from the Clerk of the Supreme Court and the Administrative Office to the author indicate that there is a passive filing without any attempt at supervision or analysis.

[248] 12 Wright & Miller, *supra* note 188, § 3151 n.12.

[249] Fed. Rules Serv.

[250] 12 Wright & Miller, *supra* note 188, § 3152, at 219.

[251] *See, e.g.*, Mathews v. Weber, 423 U.S. 261 (1976) (references to Magistrate); Wingo v. Wedding, 418 U.S. 461 (1974) (delegation to master of responsibility of conducting evidentiary hearing); Miner v. Atlass, 363 U.S. 641 (1960) (admiralty depositions); Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir. 1975) (communication with absent class members); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (no comment rule).

[252] *See Rule 83 Note*, *supra* note 232, at 1263.

[253] In Mathews v. Weber, 423 U.S. 261 (1976), counsel for one of the parties had so lost interest in the matter that the Supreme Court had to appoint an amicus to argue the validity of a local rule dealing with references to magistrates, *id.* at 265 n.2—a curious example of the failure of the adversary system in the area of rulemaking.

[254] 522 F.2d 242 (7th Cir. 1975).

[255] *Id.* at 249. In an interesting concurrence, Senior United States District Judge Wyzanski, sitting by designation, questioned the action of the court on the ground that it was, in effect, issuing an advisory opinion.

Requiring approval of local rules by a superior court is a third method of control. Equity Rule 79,[256] for example, required that district court rules be approved by a majority of the circuit court judges for the circuit. This limited form of control was abandoned with the adoption of Rule 83 of the Federal Rules of Civil Procedure.[257] Although the Federal Rules Advisory Committee had considered sending the equity control rule to the Supreme Court as an alternative to Rule 83, in the end it submitted only Rule 83 which did not provide for supervision by the circuit judges.[258] Professor Moore suggests that the Committee wanted to reduce the possibility of conflict between district and circuit judges.[259]

The technique of direct higher court supervision has been employed to a limited extent, particularly in connection with attempts to obtain speedy disposition of criminal cases.[260] Rule 50(b) of the Federal Rules of Criminal Procedure, for example, gives both the judicial council of each circuit—consisting of the full-time judges of the court of appeals—and the Judicial Conference of the United States some input into and control over the local rules. It reads in part:

> (b) Plan for Achieving Prompt Disposition of Criminal Cases. To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall . . . prepare a plan for the prompt disposition of criminal cases . . . . The district plan shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of the district court may designate. If approved the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States. The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States . . . .[261]

Such a system, though, runs the risk of predetermining any later challenge to a rule. Thus, in practice, the court of appeals will control absolutely the language of a district court speedy trial plan and, for the sake of uniformity, the plan will have its genesis in the work of a committee of judges of the Judicial Conference of the United States or of the circuit council. Approval in advance by the circuit council means, in effect, that all the sitting non-senior appellate judges have ruled by advisory opinion that the local plan is desirable and valid. Accordingly, anyone arguing in an individual case that part of the plan is invalid can probably assume some bias in favor of the rule by the court of appeals.

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[256] 226 U.S. 673 (1912).

[257] *See Rule 83 Note, supra* note 232, at 1265 n.77.

[258] 7 MOORE'S FEDERAL PRACTICE ¶ 83.02, at 83-2 (2d ed. 1976).

[259] *Id.* at 83-3.

[260] Speedy Trial Act of 1974, 18 U.S.C. § 3165(c) (Supp. V, 1975) (plan "prepared by" the district court to be submitted to a reviewing panel consisting of the council of the circuit—that is, the full-time judges of the court of appeals—and the chief judge of the district whose rules are being reviewed, or his designee).

[261] FED. R. CRIM. P. 50(b). The Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972), refused to set precise guidelines because to do so "would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts." *Id.* at 523. For the subsequent history of speedy trial rules in one court, see United States v. Salzmann, 417 F. Supp. 1139 (E.D.N.Y.), *aff'd* — F.2d — (2d Cir. 1976).

The Second Circuit case of *United States v. Furey*[262] is illustrative. There, the Second Circuit panel had before it a rule of a district court adopted, pursuant to Rule 50(b), as part of its Plan for Achieving Prompt Disposition of Criminal Cases. The rule was based upon the "Second Circuit Model Plan" followed by all the districts in the circuit. In an attempt to have the rule invalidated, the government in *Furey* argued, *inter alia*, that Rule 50(b) itself was invalid since it did not meet the requirements of its enabling legislation, section 3771 of title 18 of the United States Code.[263]

The Second Circuit, in rejecting this challenge, stressed that Congress could have rejected Rule 50(b) but had failed to do so:

> Yet despite ample opportunity to invalidate Rule 50(b) as failing to meet the requirements of § 3771, Congress chose to remain eloquently silent, permitting the rule to become effective. In these circumstances the words of the Supreme Court with regard to the Federal Rules of Civil Procedure in Sibbach v. Wilson & Co. are apposite:
>
> > The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently . . . employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules. . . .[264]

Of course neither Congress nor the Supreme Court had passed on the particular local rule in question. In effect, then, the Court of Appeals approved its own plan, without the safeguard of review by another body or a test before uncommitted judges in an adversarial setting. It is not the result in *Furey* but the process that is disquieting; courts, even more than administrative agencies, must maintain a sharp distinction between legislative and adjudicative functions if they wish to preserve a convincing appearance of impartiality.[265]

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[262] 514 F.2d 1098 (2d Cir. 1975).

[263] Section 3771, 18 U.S.C. § 3771 (Supp. V, 1975). Section 3771 grants to the Supreme Court the power to make rules of pleading, practice, and procedure for criminal cases in the United States district courts.

[264] United States v. Furey, 514 F.2d 1098, 1105 (2d Cir. 1975) (citation omitted).

[265] In the few cases where local court rules have been declared invalid by a higher

The problem was highlighted even more dramatically in the Second Circuit when rules were adopted pursuant to the Speedy Trial Act of 1974.[266] The Eastern District of New York had adopted rules which, in determining how long the prisoner had been detained before trial, excluded delays caused by defense counsel or the prisoner. Following a plan incorporated in the Act, similar to that of Rule 50(b) set out above, this provision was reported to the Second Circuit Council. The Council rejected the District's proposal and insisted on adoption of its "model" rule; it acted privately without giving the judges, the public, or the United States Attorney—who believed the "model" unsound and not required by the Speedy Trial Act—an opportunity to be heard. The Chief Judge of the Circuit felt that the interpretation of the Act by the inferior judges and the United States Attorney (who had submitted an extensive brief on legislative history to the district court judges) was without merit.[267] Should the United States Attorney have challenged this speedy trial rule, he would probably have felt that the matter had been foreclosed without a hearing. The situation was particularly troubling because the extensive analysis of the legislative history and language of the Act prepared by a group of United States Attorneys indicated a substantial issue with respect to excludable delays under the Speedy Trial Act.[268] That the matter was not free from doubt was suggested by the steady stream of announcements on speedy trials issued by the Administrative Office of the United States Courts.[269]

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court, the higher court had not participated in making the rule. *See, e.g.*, Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir. 1975). Whether the higher courts have decided such cases correctly is not relevant to this discussion. What is clear is that a court which has not been involved in the drafting and approval of a rule is freer to act impartially in determining the validity of that rule in an adversarial setting.

[266] 18 U.S.C. §§ 3161-74 (Supp. V, 1975). *See also* Federal Judicial Center, Annual Report 14 (1975) (discussing the activities in this connection of the Center). *Cf.* United States Courts for the Second Circuit, 1975 Annual Report 93 (mimeograph) (description of planning activities introduced to expedite implementation of Act).

[267] Letter of the Chief Judge of the Second Circuit, Irving Kaufman, to the author (October 14, 1975); Resolutions of the Eastern District of New York (October 20, 1975). *See also* letter of the Chief Judge of the Eastern District of New York, Jacob Mishler, to the Chief Judge of the Second Circuit (July 31, 1975) (suggesting that the Eastern District Court change to the model plan drafted by the Administrative Office), and the response (August 18, 1975); memorandum of Circuit Executive to Second Circuit Judges (August 22, 1975); memorandum of Chief Judge Mishler to the Eastern District Judges (September 17, 1975) (submitting "Judicial Council Recommended Amendments to Conform Rule 50(b)"); Memorandum of Judge Orin Judd to Chief Judge Mishler (October 6, 1975); Memorandum of the author to Chief Judge Mishler (October 8, 1975); Memorandum of Judge Judd to the Eastern District Judges (October 17, 1975); Letter of Judge Judd to Chief Judge of the Second Circuit (October 20, 1975); October 23 Memorandum of Judge Platt attached to Order of Eastern District Court (October 20, 1975); Memorandum of Judge Judd to the Judicial Council (October 28, 1975). Numerous requests that the Judicial Council hear the Eastern District Judges opposing the Second Circuit model were not acted upon. Minutes, Regular Meeting, Board of Judges of the United States District Court, Eastern District of New York (October 20, 1975).

[268] *See, e.g.*, Telex to all U.S. Attorneys from H.M. Ray, Chairman, Legislative and Court Rules Subcommittee, Attorney General's Advisory Committee of United States Attorneys (Oct. 20, 1975); H.M. Ray, Speedy Trial Act of 1974: Applicability of Exclusions to Interim Limits (mimeograph, n.d. 1975).

[269] *See* letter from the "Speedy Trial Coordinator" of the Administrative Office of the United States Courts to all federal judges (February 12, 1976) (listing numerous such an-

Subsequently, a special committee of judges of the Court of Appeals for the Second Circuit met with a judge of the Eastern District and worked out a compromise plan that met both courts' approval.[270] The bar was never privy to these discussions despite the fact that it will be seriously affected by calendar problems created by the Speedy Trial Rules.[271]

As the foregoing material illustrates, each of the commonly used methods of controlling local court rulemaking has its particular shortcomings. But the most pervasive deficiency in this area of rulemaking, and the one most seriously in need of correction, is the failure of local rulemaking procedures to provide to those affected by the proposed rules an opportunity to be heard. Some instances of this have already been noted, but further examples will emphasize the significance of the problem.

When the Second Circuit recently promulgated special training requirements for admission to its bar,[272] it failed to make advance public announcement of the new rule, and provided no chance for interested parties to argue in opposition to the change.[273] By contrast, notice and public hearings were afforded in connection with Second Circuit proposals to restrict admission to the bar of district courts, and a serious debate developed.[274] Ultimate rejection of the proposed district court rule in the Southern and Eastern Districts of New York[275] dramatically illustrated the value of open discussion. The Council of the Second Circuit had supported the rule, and private communications from both the chief judge of the circuit and the Chief Justice of the United States had urged the district judges to consider the proposal favorably. In the absence of public hearings

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nouncements). *See also* Administrative Office of the United States Courts, Report on Speedy Trial Act of 1974 (Sept. 30, 1976).

[270] Minutes, Regular Meeting, Board of Judges of United States District Court Eastern District of New York (June 21, 1976).

[271] The proper role of judicial conferences and councils in working with bench and bar in administering the courts is beyond the scope of this Article. For a discussion bearing on this subject, see Nat'l Conf. of Fed. Trial Judges, Jud. Admin. Div., ABA, A Look at Federal Circuit Judicial Conferences and Councils, 33, 48, 49, 53, 57, 60-63 (1976).

[272] N.Y. Fed. Ct. R. 4-13.1 (2d Cir. 1975) (Standards for Practice by Attorneys).

[273] The result is a rule which may well conflict with Rules 46(a) and 47 of the Federal Rules of Appellate Procedure since the Appellate Rules are designed to permit a national federal appellate bar ready access to all the courts of appeals. *See generally* Weinstein, *Proper and Improper Interactions Between Bench and Law School*, 50 St. John's L. Rev. 441, 451 n.31 (1976). It is somewhat amusing that the late Professor Bickel, who argued the Pentagon Papers cases in the Second Circuit and Supreme Court, would probably not have qualified for admission in the Circuit without some special exemption, since he had never argued a case in any court, save for a small claim in New Haven. *See* Polsky, *In Praise of Alexander Bickel*, Commentary, January, 1976, at 52.

[274] *See, e.g.*, Ehrlich, *A Critique of the Proposed New Admission Rule for District Courts in the Second Circuit*, 61 A.B.A.J. 1385 (1975); Weinstein, *supra* note 273, at 451 n.31; statement of Dean Michael I. Sovern of the Columbia University School of Law at public hearings held November 20, 1974 at Association of the Bar of the City of New York (unpublished), *appearing in another form at* 67 F.R.D. 577 (1975). Committees of the Association of the Bar of the City of New York, the County Lawyers' Association, and the Federal Bar Council have opposed the proposals. *See, e.g.*, 31 Rec. of the Ass'n of the Bar of the City of N.Y. 95 (Jan./Feb. 1976).

[275] N.Y.L.J., Dec. 22, 1975, at 1, col. 3; N.Y.L.J., Dec. 16, 1975, at 1, col. 2. Some districts did, however, adopt the rule. *See* N.Y.L.J., Dec. 24, 1975, at 1, col. 3.

and debate there seems little doubt that the proposals would have been quietly adopted.

Still another example of important rules adopted first and opened to public debate later are those restricting citation of "non-published" decisions of federal courts of appeals.[276] The various courts of appeals have adopted different rules on publication and citation, rules which have had a serious impact on publishers of opinions as well as on advocates. In light of their impact, a uniform approach to such rules is clearly desirable; yet studies by a committee of the United States Judicial Conference were undertaken only *after* the rules had been adopted.[277] No judicial body had the authority to overrule the individual courts of appeals or to insist that they delay adoption of their rules. Even if the United States Judicial Conference had had the power, it probably would not have exercised it, since the normal deference extended to each chief judge sitting on the Conference would permit him to protect the rules of his own court.

By contrast, the Judicial Conference of the United States, through a special subcommittee working with the American Bar Association, has drafted "Uniform Rules of Disciplinary Enforcement" designed to be adopted by local federal courts.[278] The subcommittee was of the view that such rules could not be adopted nationally pursuant to any statutory or inherent power of the Supreme Court.[279] Accordingly, the Judicial Conference will probably promulgate them as guidelines and then urge each of the federal courts to adopt them. The only objection the author has to this procedure is that the proposals should be published generally before either promulgation or adoption. Some local and state bar associations have had extensive experience in disciplinary matters and lawyers should be heard.

Lack of public debate and publication of local rules before adoption is typical.[280] Mere publication is probably not enough to remedy this situa-

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[276] *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, OPINION WRITING AND PUBLICATION 2 (1974); STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 5 (FJC Research Series No. 73-2, August 1973).

[277] *See* United States v. Joly, 493 F.2d 672, 675-76 (2d Cir. 1974); Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 387 (1973); Board of Federal Judicial Center, Recommendations and Report to April 1972 Meeting of the Judicial Conference of the United States (mimeograph); Subcomm. on Federal Jurisdiction, Report to the Chairman and to the Members of the Comm. on Court Administration 9-10 (1972) (mimeograph) (containing responses from various courts of appeals); Administrative Office of United States Courts, Report to the Subcomm. of Federal Jurisdiction on the Operation of Circuit Opinion Publication Plans (Jan. 7, 1975) (mimeograph).

[278] *See* letter from William E. Foley to all federal judges, dated October 1, 1976, with proposed "Uniform Rules of Disciplinary Enforcement."

[279] *Id.*

[280] As the Director of the Federal Judicial Center recently indicated,

> local district and circuit rules are not customarily published in advance and courts do not conduct hearings thereon. [With one exception] I know of no advance distribution of proposed rule changes although there are bench-bar committees in some areas and perhaps some minimal contact through that source.

Letter to the author (Jan. 5, 1976). An extreme example of this practice occurred in 1968 when "the Court of Appeals for the Fifth Circuit, without prior notice to or consultation with any segment of the bar, adopted the first significant 'screening' procedures for the curtailment and tion. Members of the bar will generally fail to respond unless committees of the bar associations have studied the matter or unless the court itself appoints a committee or reaches out to invite public comment from those persons who should be interested. The meetings of the circuit conferences have sometimes been used to good effect in this connection. The experience in the Eastern District of New York, where most rules are published before adoption, is that almost no communications are received unless pointed questions are put to individuals and associations. In the Northern District of Illinois the experience has been similar.[281] Nevertheless, any effort to involve the bar and public is worthwhile: not only will it result in valuable suggestions and the avoidance of inadvertent errors, but also in greater acceptance of changes on the part of practicing lawyers and others.[282]

Adoption without an opportunity for those affected to be heard is undesirable. No rule adopted by a regulatory agency after such procedure would be permitted to stand.[283] The lack of deliberation and public debate was apparently one reason the Supreme Court in *Miner v. Atlass*[284] struck down a local rule permitting depositions in admiralty cases:

> The problem . . . is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rulemaking powers of the Court . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords.[285]

Such a result, however, is rare. The Supreme Court permitted a much

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elimination of oral argument" in the Court of Appeals. Segal, *Trial Balloon—Oral Argument in the U.S. Court of Appeals: Can it be Salvaged?*, 2 LITIGATION 3 (Fall 1975). This was the same year in which Rule 34 of the Federal Rules of Appellate Procedure, dealing with oral argument, became effective. *Id.*

A memorandum of one of the project directors of the Judicial Center reflected the view of many judges when it noted:

> [M]any proposed rules may be assumed to be likely sources of bar opposition, despite their merit. Apart from natural conservatism among the bar, many rules do impose additional burdens, which lawyers naturally oppose. Perhaps pre-publication or hearings would allow the courts to minimize the burdens. Perhaps, also, those procedures might harden bar opposition to rules that are desirable and necessary. Why take the chance?

Memorandum of Steven Flanders to Judge Walter E. Hoffman (December 22, 1975).

[281] Memorandum of Steven Flanders to Judge Walter E. Hoffman (January 9, 1975); letter of H. Stuart Cunningham to author (January 22, 1976).

[282] *See, e.g.*, letter of Judge Eugene A. Wright, United States Court of Appeals for the Ninth Circuit, to the author (January 19, 1976):

> From my experience in this court and in the state court system, I can tell you that it is always wise to work with a bar committee. Lawyers will accept rules, even those they do not like, if they have had an opportunity to be heard before the court finally adopts them. The Washington Supreme Court learned this years ago and it now gives at least six months' notice to the state bar before adopting any rule changes.

[283] *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6.04-.06 (1958); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

[284] 363 U.S. 641 (1960).

[285] *Id.* at 650.

more controversial and radical change by local rulemaking when it approved six person juries in *Colgrove v. Battin.*[286] The Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure and the Judicial Conference had all agreed that a reduction in the size of civil juries should be accomplished by statute rather than local rule or promulgation as an amendment to the Federal Rules of Civil Procedure.[287] Despite the clearly sound conclusion that all the protections afforded by congressional hearings were desirable before the number of jurors was reduced, local federal rules reducing juries were promulgated widely in the wake of *Colgrove.*[288] Generally, these local rules were adopted without open debate or full study.

It is doubtful that Congress would have readily approved such changes by statute or that it would not have questioned a like change in the Federal Rules of Civil Procedure. Before the Supreme Court decided *Colgrove*, Professor Moore pointed out that "[i]t would border on the quaint to suppose that the number of alternates is a matter requiring uniformity of practice under the Rules (Rule 47(b)) while the number of jurors is left to local rules."[289] The Supreme Court, however, did not agree. Professor Zeisel has expressed grave doubt about the statistical validity of the data judicially noticed by the Supreme Court in *Colgrove.*[290] The matter was certainly worthy of a more effective debate than it was accorded when it was attacked as a *fait accompli* in litigation that culminated in the Supreme Court in *Colgrove*. Earlier consideration of the matter by a group having national responsibilities and an effective forum for debate would have been useful.

B. *Improvement in Local Rulemaking*

As noted above, local rules are typically adopted without the aid of an advisory committee, without publication in advance, and without an opportunity for interested parties to be heard before the judges act in private.[291] Professors Wright and Miller accurately observe that

> the process by which local rules are made is simply not suited for the complex and controversial subjects to which many local rules are addressed.

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[286] 413 U.S. 149 (1973).

[287] 1971 United States Judicial Conference Report 5-6, 60.

[288] *See, e.g.*, N.D. Ala. R. 4; D. Conn. R. 12a; D. Del. R. 14a; D.D.C. R. 1-17(a); N.D. Fla. R. 18. Eighty-two out of 94 federal district courts have now adopted some forms of the six member jury in civil cases. The Third Branch, Sept., 1976, at 7, col. 2.

[289] 7 Moore's Federal Practice ¶ 83.03n.4, at 83-86 2d ed. 1976.

[290] Zeisel & Diamond, *"Convincing Empirical Evidence" on the Six Member Jury*, 41 U. Chi. L. Rev. 281 (1974); Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710 (1971). *See also* Lempert, *Uncovering Nondiscernible Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 694 (1975). 694 (1975).

[291] *Cf.* Doran v. United States, 475 F.2d 742 (1st Cir. 1973) (United States Attorney not aware of rule; effective means of promulgation and recompilation should be developed).

> . . . In a few districts a committee of local practitioners is consulted but this is the exception rather than the rule. In most districts the judges consult with each other and make local rules on their own. It is decidedly the exception for the bar and the law schools to be given an opportunity to comment on proposed drafts of local rules.
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> . . . It is wholly unsatisfactory as a means of dealing with such difficult and controversial topics as separate trial of liability from damages or impartial medical examinations. Yet these, and many other equally sensitive matters, have been thought the proper subject for local rules in many districts.[292]

In one instance of this general practice of in camera rules adoption, the Supreme Court of New Jersey took the flat position that maximum contingent fees could be established by rule without a prior evidentiary hearing.[293] It relied upon judicial notice and on its "accumulated experience over the years."[294] The court did, however, hold "an open meeting. . . with representatives of the Bar to elicit views as to the adoption of the rule."[295] Such a meeting is a most unusual step in local rules promulgation.[296] Yet, there is no practical reason why the public cannot be involved.

Some courts, such as the Eastern District of New York, have adopted the practice of publishing most proposed rules in advance, and sending copies to the various bar associations with a request for comments. Generally those comments have been sparse. The author's belief is that a hearing should be held at which testimony on the proposals is taken. Most judges, however, disagree; because of the paucity of comment received in the past, they have not felt such a hearing necessary. The author has concluded that were a hearing held and specific persons invited to testify, a useful debate could be generated on some of the proposals. Such hearings would also provide the bar with a forum for ventilating other grievances and making suggestions. When the Eastern District of New York was considering adopting its individual calendar assignment rules, for example, a public hearing was held. It was well attended and resulted in a number of useful suggestions as well as in a better understanding by both the bench and bar of the problems that the new rules might create.

Standing committees such as those used in connection with national rules might also help focus attention on local practice. If public participation is considered unwieldy, a court should at least avail itself of an advisory committee. Cognizant of the objection to ex parte promulgation, the federal judges in the Northern and Southern Districts of Iowa worked closely with the Special Committee on Federal Practice and Procedure of the Iowa State Bar Association in drafting rules for their courts.[297]

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[292] 12 WRIGHT & MILLER, *supra* note 188, at 220.

[293] American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974). *See also* American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467 (1973) (per curiam) (remand to three-judge federal court to await conclusion of state court proceedings). *Cf.* Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43 188 N.Y.S.2d 491 (1959), *appeal dismissed and cert. denied*, 361 U.S. 374 (1960) (courts have power to define excessive contingent fees for purposes of disciplinary action).

[294] American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 266, 330 A.2d 350, 354 (1974).

[295] *Id.* at 266 n.8, 330 A.2d at 354 n.8.

[296] The New York court limitations on contingent fees were adopted after public hearings. *See* Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43 (1959), 188 N.Y.S.2d 491, *appeal dismissed and cert. denied*, 361 U.S. 374 (1960), *noted in* 60 COLUM. L. REV. 242 (1960).

Professors Wright and Miller suggest that approval of local rules be required, "perhaps by the Standing Committee on Rules of Practice and Procedure or its parent body, the Judicial Conference of the United States, before they may go into effect."[298] Professors Wright and Miller's alternative proposal, that the power be circumscribed by amending Federal Rule of Civil Procedure 83 and its criminal and appellate counterparts to specify "those few limited areas in which local rules may be made,"[299] seems too restrictive and assumes a skill in drafting and prescience not normally available.

One advantage of having all local rules reported to a national rulemaking authority is that attention to developments might suggest areas where national standards should be considered.[300] Lacunae in the national rules might be revealed and discrepancies in local practice identified, warranting elimination of conflicts for somewhat the same reason that the Supreme Court attempts to eliminate conflicts between the circuits. In *Miner v. Atlass*,[301] for example, the Supreme Court struck down local rules dealing with discovery in admiralty on the ground, among others, that uniformity was required, and then adopted a discovery-deposition rule for admiralty.[302] When new national rules are adopted, such as, for example, the amendment making uniform the order of the parties on summation,[303] a national rulemaking authority could order conforming changes in local rules. Differences in local rules governing jury size may sometimes lead to inadvertent waivers, suggesting the need for uniform national treatment.

If the Judicial Conference of the United States were given some control over local rules, the chief judge of each circuit as well as the Chief

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[297] *See* Blair, *The New Local Rules for Federal Practice in Iowa*, 23 DRAKE L. REV. 517, 520 (1974).

[298] 12 WRIGHT & MILLER, *supra* note 188, at 223.

[299] *Id.*

[300] *See Local Rules Comment, supra* note 240, at 1011. A curious example of "national local rules" is the proposed "Model Local Rule and Complaint in the Social Security and Black Lung Litigation." It was forwarded to all United States District Judges by the Director of the Administrative Office of the United States Courts by letter dated March 1, 1976, "at the request of the Committee on Court Administration of the Judicial Conference with a recommendation for favorable action." Apparently it was first sent to the Administrative Office by letter dated January 7, 1976, from the Office of General Counsel of the Department of Health, Education and Welfare with a letter indicating that it had been drafted by the General Counsel's office and the Department of Justice. There is no indication of publication in advance, as probably would have been required had an administrative regulation been adopted. Nor is it apparent why, if a uniform national rule were required, the ordinary procedures for amending the Federal Rules of Civil Procedure were not followed.

[301] 363 U.S. 641, 649-50 (1960).

[302] Adm. R. 30A, 368 U.S. 1023 (1961).

[303] *See* FED. R. CRIM. P. 29.1.

Justice of the United States and a number of district judges would, by passing upon the rule, reduce somewhat their apparent impartiality should the rule come before one of them in litigation. However, the impact on any particular decision would be minimized by use of panels at the court of appeals level and the entire bench at the Supreme Court level. Furthermore, a request in any court for disqualification would undoubtedly be honored. The risk of a claim of bias by a litigant would thus be reduced to the vanishing point. Where, in contrast, the entire circuit council passes on the validity of a rule in advance, the claim of partiality may be substantial, as already demonstrated, and there may be no practicable way of dealing with it.

Effective reporting and some degree of control at the national level might result in reduction of the plethora of local rules; this would accord with the original intent of the drafters of the Federal Rules of Civil and of Criminal Procedure.[304] The present local rules situation has been characterized by Professor Rosenberg as "a kind of procedural Tower of Babel."[305]

C. *Quasi-Rule Directives*

The United States Judicial Conference has issued a wide variety of recommendations to guide lower courts, many of them of a rule-like character. They range from disapproval of the use of a conspiracy indictment to convert joint misdemeanors into a felony, to suggestions as to which cases should receive preferences, which ones are suitable for masters, and which ones justify granting bail before or after conviction.[306]

Occasionally the directives are followed with such faithfulness that they become, in effect, rules—rules, however, lacking even customary minimal procedural safeguards. Second Circuit guidelines, for example, reducing below the statutory level the compensation available to attorneys appointed to represent indigent criminal defendants, are rigidly enforced despite the fact that they were adopted without public debate or publication and at a time when the cost of living was 40% below what it is now.[307] Such policy-making directives may have distinct substantive overtones.

In some state courts such as those of New York, private directives from the Presiding Justice of the Appellate Division or an administrative judge control the discretion of trial judges.[308] To the extent that these directives and quasi-rules are not published, they create serious problems for the practicing lawyer.[309]

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[304] *See Rule 83 Note*, *supra* note 232, at 1255-59.

[305] *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967) (testimony of Professor M. Rosenberg on April 21, 1967), *quoted in Rule 83 Note*, *supra* note 232, at 1259.

[306] P. Fish, The Politics of Federal Judicial Administration 71-74 (1973).

[307] *See* letter from Chief Judge of Second Circuit to Judge Bonsal (November 13, 1975). *Cf.* [1975] Report of the Proceedings of the Judicial Conference of the United States 75 (Sept. 25-26, 1975) (guideline on payments under Criminal Justice Act for defendants who have some resources).

[308] *See, e.g.*, Directive, limited stays in criminal appeals (February 5, 1975); Directive,

At the least, directives should be published, so that they can be systematically gathered, analyzed, and criticized. Ideally, the same procedures of publication and hearing before adoption should be followed as in the case of other rules.

D. *Guidelines*

Courts or committees may issue guidelines that differ from rules only in the informality of their adoption. The range of topics touched upon can be as broad as that covered by rules and the influence on court activities can be as pervasive. For example, the Second Circuit Judicial Council has recently recommended guidelines on sentencing for adoption by the district courts.[310] While they would have no binding effect, the impact on sentencing would be quite substantial—similar to that of a rule or statute allowing some discretion.

The Eastern District of New York has adopted an extensive list of "fines" which may be levied for various infractions, ranging from $100 per bird for taking migratory nongame birds to $25 for advertising on certain public lands.[311] They are "guidelines" only, but they will be followed despite the fact that no notice or public hearing was provided. Even if such a guideline is ignored, an appellate court will tend to be heavily influenced by it, particularly if the court participated in the formulation.

The trend is for more supervision, not less. Numerous agencies and officials have come forward in the last few decades to assist in improving court administration. The Administrative Office of the United States Courts, for example, was established to aid in the achievement of one of the major purposes of the Act of August 7, 1939:[312]

> to furnish to the federal courts the administrative machinery for self-improvement, through which these courts [would] be able to

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use of split trials "whenever possible" (January 31, 1974); Directive, avoid referrals of custody disputes to Family Court (April 4, 1974).

[309] In Mathews v. Weber, 423 U.S. 261 (1967), for example, the Court upheld General Order No. 104-D of the Central District of California which provides for initial reference to a magistrate in certain administrative review matters. This order might well affect an attorney's trial tactics. Yet, an examination of the current Federal Rules Service purporting to contain all current local rules does not reveal this order.

[310] *See* N.Y. Times, March 18, 1976, at 37, col. 3. *See also* Joint Comm. of the Ass'n, The New York County Lawyers' Ass'n and the Fed. Bar Council, *Federal Sentencing Practices*, 30 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 652 (1975). The proposed rules are set out in N.Y.L.J., March 18, 1976, at 1, col. 3. By resolution of the Board of Judges of the Eastern District of New York, adopted February 9, 1976, those portions dealing with treatment of the presentence report were adopted (without public notice) and embodied in notices of sentencing to be mailed by the probation department. Subsequently, more extensive "sentencing standards" based upon Second Circuit proposals, but with some modifications, were adopted to guide lawyers and court personnel. N.Y.L.J., Oct. 15, 1976, at 1, col. 3. No public hearings were held before adoption.

[311] E.D.N.Y. R. 252.

[312] Chandler v. Judicial Councils, 398 U.S. 74, 97 (1970).

> scrutinize their own work and develop efficiency and promptness in the administration of justice.[313]

The Federal Judicial Center was organized to conduct studies and make recommendations with respect to the improvement of the administration of justice.[314] These groups and others, including the circuit judicial councils and conferences, tend to share their expertise on the judicial system by issuing guidelines, drafts of rules and suggestions concerning procedure in the district and circuit courts.

This development is one that most judges interested in improving the work of the courts welcome, since it generally results in more effective justice. The impact of these guidelines on the rights of litigants and attorneys may, however, be substantial—yet attorneys and the public are usually ignorant of their promulgation and operation.

There are some signs, however, that organs of court reform are beginning to recognize the need for public participation in developing guidelines. One recent example is seen in the Federal Judicial Center's treatment of its "Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts." Its proposals were marked "Tentative." The Special Committee that drafted the report recommended that it "be circulated to every federal judge and to appropriate bar association groups and law school faculties."[315] Obviously, prisoner groups, legal aid-public defender organizations, and representatives of correctional groups such as associations of guards, should be given the opportunity to be heard. Forms for orders included in the report, and a suggestion that the report be kept with the judge's benchbook,[316] indicate that it will have an impact at least as great as many of the Federal Rules of Civil Procedure in controlling this kind of litigation.

As another example, the manual which now governs procedure in much complex and multidistrict litigation[317] was prepared by federal judges after extensive consultation with the bench, bar and law schools.[318]

The recommended A.B.A. procedure for adoption of standing guidelines also provides for public participation:

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[313] H.R. Rep. No. 702, 76th Cong., 1st Sess. 2 (1939), *cited in* Chandler v. Judicial Councils, 398 U.S. 74, 97 (1970).

[314] *See* 28 U.S.C. § 620 (1970).

[315] Letter from Judge Ruggero J. Aldisert to United States Judges, Circuit Court Executives, and Clerks of Court (January 30, 1976). By contrast, the memorandum of the Deputy Director of the Administrative Office of the United States Courts (January 13, 1976), indicated that the "Addendum to Guidelines to the Amendments to the Federal Rules of Criminal Procedure Which Relate to the Preparation and Use of Presentence Reports" would only be sent to "United States District Judges, Magistrates, Clerks of Court, Public Defenders, and Probation Officers."

[316] "The report was prepared in loose leaf form to facilitate changes and additions. This format also permits the inclusion of the report in a benchbook, thus enhancing its utility as a reference tool." Letter from Judge Ruggero J. Aldisert to United States Judges, Circuit Court Executives and Clerks of Courts (January 30, 1976).

[317] Federal Judicial Center Manual for Complex Litigation (1973).

[318] *Id.* at xiv-xvi. *See also* note 28 *supra*.

1. The court drafts proposed guidelines.
2. The court makes the proposed guidelines public by distribution to the community and to state and local news media, news media organizations, bar organizations, law enforcement agencies, public defenders' offices, prosecutors' offices and such other interested persons as may come to the attention of the court.
3. The court solicits written comments and suggestions as to the guidelines to be submitted by a specified date.
4. The court schedules meetings between judges and interested persons for open discussion of the proposed guidelines.
5. The court then determines guidelines to be adopted.
6. The guidelines are publicly distributed and published broadly and generally in the community, including distribution to the persons described in paragraph 2, with a notice that they will be adopted absent a written objection to be filed with the court by a specified date.
7. If there are no objections filed, the court adopts the guidelines.
8. If objections to the guidelines or any portion thereof are filed, the court shall follow a procedure by which any persons could be heard and present facts and arguments as to how or whether the guidelines should be specifically modified.
9. After such proceeding, the court adopts final guidelines, stating the reasons for the adoption of the guidelines with specific reference to any guideline which was the object of controversy at the proceeding.
10. Review. It is recommended that some method of appellate review at the behest of interested persons without reference to a given case be afforded, since the guidelines are designed to be implemented outside the context of any particular case. Perhaps this could be accomplished by the same procedure and on the same grounds as review of local rules. Perhaps the appellate court as a supervisory court could be asked for approval or modification of these guidelines. Perhaps a judicial council would have the authority for a review. The method of review is left for local implementation.
11. The standing guidelines should be subjected to periodic review. Modification, either on the request of interested persons or *sua sponte* by the court, shall be considered by following the above adoption procedure.[319]

While adoption of these recommendations would substantially improve present procedures for developing guidelines, two reservations may be expressed. First, it probably would be more useful, in the light of prior experience in this country, for the court to appoint an advisory committee to make initial recommendations and propose drafts, rather than drafting guidelines itself, as the A.B.A. procedure provides. Perhaps the American Bar Association Committee felt that it was acting in this capacity and, therefore, that this preliminary step was not necessary.

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[319] American Bar Association, Proposal, "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press," *quoted in* Roney, *The Bar Answers The Challenge*, 62 A.B.A.J. 60, 64 (1976).

Second, the wisdom of requiring appellate review of guidelines is open to serious question. Such a review would compromise the reviewing court in the same way that prior review of rules does. A sufficient degree of protection would be afforded by placing the review function in the Standing Committee on Rules of the United States Judicial Conference; power could remain in the full Judicial Conference to overrule a veto by the Committee on Rules. The delay and opportunity to resort to Congress for protective legislation might lead to more thorough consideration and possible compromises without jeopardizing the impartiality of the litigation process.

E. *Individual Judge's Rules*

Rule 83 of the Federal Rules of Civil Procedure provides that district courts may adopt local rules "by action of a majority of the judges. . . ." It has been suggested that this "majority requirement . . . constitutes a narrowing of the statutory grant of rule-making power in 28 U.S.C. § 2071."[320] The limitation may be "desirable insofar as it promotes greater uniformity of practice within a single district."[321] If this is the purpose, however, it has not always been achieved.

Particularly with the growth of individual calendars, as contrasted with general calendars, there has been a tendency for individual judges to develop their own practices. One recent study notes:

> In addition to the . . . regularly reported sets of rules which govern, *inter alia*, motion practice and calendar matters in the Southern District, at least twenty-two of the twenty-four active and four sitting senior judges have special motion and or calendar rules with which counsel must be familiar. These special rules vary greatly and lead to some confusion among litigants. . . .[322]

The report suggests "a more readily available published edition of each judge's special rules and limited standardization. . . ."[323]

Practices of individual judges lie in a gray area between rulemaking and the exercise of individual discretion. Some variation here is acceptable and, perhaps, desirable since a judge may be more efficient if he or she is comfortable with the details of his or her practice. But in some instances the divergence seems unnecessarily idiosyncratic and a local rulemaking process in which the bar and law schools participated might eliminate unnecessary differences.[324]

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[320] Blair, *supra* note 297, at 518 n.6. Section 2071 of title 28 grants power to "all courts established by Act of Congress [to] prescribe rules for the conduct of their business."

[321] Blair, *supra* note 297, at 518 n.6.

[322] Committee on the Federal Courts, The Association of the Bar of the City of New York, Report Evaluating the Individual Assignment System in the Southern District of New York After Three Years Experience 5 (July 8, 1975) (mimeograph).

[323] *Id.*

[324] The report notes:

Ten judges require . . . papers to be filed only in the Clerk's Office; six . . . require

CONCLUSION

A. *Suggested Changes in the National Rulemaking Process*

1. Although the present division of national rulemaking authority among the United States Judicial Conference and its committees, the Supreme Court, and the President has worked fairly well, defects in the distribution of authority and the process utilized suggest that revision of the relevant statutes and practices is now desirable.

2. The Supreme Court should not adopt rules for any court except itself. Its members have little expertise in most of the areas regulated by rule, due to their lack of trial experience; and their heavy work load prevents adequate study of the issues. While the Court's involvement bestows prestige on the rules, it inhibits the Court itself and other courts from impartially construing the rules.

3. The United States Judicial Conference should take the place of the Supreme Court as the national rulemaking authority. This change would not appreciably reduce the leadership role of the Chief Justice, who serves as chairman of the Conference. If an independent body of judges rather than a court is given responsibility for the rules, courts will be free to consider the rules impartially.

4. The structure currently employed for rulemaking by the United States Judicial Conference—that of a Standing Committee on National Rules of Court Practice and Procedure, and satellite advisory committees—is sound and should be retained. With representatives of the bar, bench and law schools on the committees and with the tradition of law professor reporters, an orientation both practical and scholarly is achieved. A Standing Committee of no more than fifteen members, with staggered terms of five years, would seem desirable. Appointments should be made by the Judicial Conference—which means practically speaking by the Chief Justice with the advice of the Conference—to maintain the high status of membership.

Ex-officio memberships are not required to ensure a broad range of representation on the committees; the Chief Justice and Judicial Conference should be expected to consult on appointments with the United States Attorney General, and with such organizations as the American Bar Association, the Legal Services Corporation, the American Association of

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> duplicate sets to be filed in the Clerk's Office and in chambers, and one judge requires papers to be filed only in chambers. . . . Ten judges specify that oral argument is permitted only if the judge deems it appropriate; three judges permit oral argument on request of counsel, and three judges generally require oral argument on all motions.
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> . . . Finally, two judges require the filing of a Note of Issue or Statement of Readiness in all civil cases. Twenty judges do not have such a special rule, although most of these judges . . . do have published lists of civil cases ready for trial.

Id. at 40-42.

Law Schools and the National Legal Aid and Defender Association. The desirability of minority representation should be considered in making appointments. If Congress adopts a statute on the subject, precatory language concerning the need for broad representation on the committees would be appropriate.

Neither Congress nor the President should be represented on the Standing or advisory committees. Even the presence of congressional observers may give the senior members of Congress who designate them a disproportionate influence in rulemaking and thus impair the ability of Congress to assess proposed rules without bias.

5. The Standing Committee should widely publicize the proposals of its advisory committees and hold public hearings upon them before recommending adoption to the Judicial Conference. Where the Standing Committee's or an advisory committee's judgment has been seriously questioned, the Standing Committee should not hesitate to request relevant studies from such groups as the Federal Judicial Center, the American Bar Foundation, the American Law Institute, and law schools. Thorough airing of the issues before adoption may reduce congressional desire to review the details of proposed rules.

6. Congress should retain the power to reject any proposed rule or amendment by joint resolution within a limited period. Six months should suffice. If Congress needs more time for review or wishes to amend the rules, it should be required to employ the usual legislative procedure, with presidential participation.

7. Congress should confine its involvement to the review of substantial principles, rather than redrafting details of rules. Congress should not make changes unless they constitute clear improvements.[325]

8. Substantive matters (such as rules of privilege), important quasi-constitutional procedural matters (such as reduction in size of juries), or jurisdictional matters (such as appeals from sentences), should be handled by legislation and not by rules. It is appropriate for the rulemaking bodies to draft and recommend legislation so that necessary improvements do not "fall between the stools."

B. *Suggested Changes in the Local Rulemaking and Guideline-Making Process and in Rulemaking by Individual Judges*

1. No local rule for an appellate or trial court should be adopted without publishing the proposal in advance and providing for a public hearing after notice. Mere publication will not suffice; affirmative efforts

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[325] Congress' detailed intervention in the formulation of the Federal Rules of Evidence and the 1975 Amendments to the Federal Rules of Criminal Procedure needlessly diminished the prestige of the judiciary as a rulemaking institution; many of the congressional modifications involved no significant policy issues, but rather reflected personal predilections of individual members of Congress.

should be made to engage the bar, bench and law schools in the process. Thus, each court should utilize advisory committees that would call on cooperating representatives of the public, including lay persons.

2. To preserve national uniformity and control excessive or unwise local rulemaking, no local rule, other than a rule of the Supreme Court, should be effective until it has been reported to, and approved by, the Standing Committee on National Rules of Court Practice and Procedure.[326] If the Standing Committee rejects a rule or fails to approve it within six months, the United States Judicial Conference should have the right of approval.

3. Guidelines or their equivalent, whether adopted for a court by itself or by another judicial body, should be published before they become effective. Upon objection by any person, a public hearing should be held.

4. Individual judges should eliminate, as far as possible, rules and practices which diverge from those of other judges on their court.

5. All local rules, guidelines and individual judge's rules should be made available in a current and readily usable form to the bench, bar and public.

C. *Public Access to Materials*

All documents considered in connection with a rule or guideline adopted by the United States Judicial Conference or by any court (or other judicial body) should be made available to the press and to members of the public on demand. Public hearings should be recorded and a transcript should be made similarly available. Wherever possible, a report should be prepared detailing the reasons for adopting a rule. Such a report will assist courts in interpreting the rule, and will protect against arbitrary conduct or its appearance.

D. *Initiating Change in the Rulemaking Process*

Recommendations for changes in the rulemaking process could come with propriety from any of the branches of government. Since the Judicial Conference of the United States has a duty "to carry on a continuous study of the operation and effect of the general rules of practice and procedure,"[327] it would seem desirable for the Conference and its committees to suggest changes in rulemaking procedures. Congress could then act on these recommendations with the assistance of the executive branch. Should the Conference fail to come forth with proposals within a reasonable time, Congress or the President through the Attorney General should take the initiative.

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[326] An exception should be made to permit adoption of local rules without Committee approval where necessary to meet emergency situations. The duration of such rules should be limited to one year.

[327] 28 U.S.C. § 331 (1970).

DEBATE PROPOSITION ONE

Resolved: That the United States Should Adopt Uniform Rules
Governing the Criminal Investigation Procedure of all Public Law Enforcement
Agencies in the Nation

This resolution addresses possible reforms of investigative procedures employed by public law enforcement agencies. Exploration of this topic might include an examination of search and seizure procedures, the use of informants, or questions with respect to disclosure of press sources, among other areas of inquiry.

The Exclusionary Rule: Its Necessity in Constitutional Democracy

By Dr. Steven Cann* & Dr. Bob Egbert**

Introduction

While the differences between the Burger and Warren Courts are perhaps not of the magnitude once expected,[1] the most dramatic differences occur in the areas of the fourth, fifth and sixth amendments. Specifically, the Warren Court considered the exclusionary rule to be a viable enforcement tool for fourth, fifth and sixth amendment rights by its requiring suppression of criminal evidence obtained in their violation.[2] The Burger Court is less enthusiastic about the exclusionary rule.[3] Indeed, only two Justices on the present Supreme Court support the exclusionary rule with regularity.[4]

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[1] Steamer, *Contemporary Supreme Court Directions in Civil Liberties*, 92 Pol. Sci. Q. 425 (1977).

[2] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Mapp v. Ohio, 367 U.S. 643 (1961)

[3] *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); Andresen v. Maryland, 427 U.S. 463 (1976); United States v. Robinson, 414 U.S. 218 (1973); Harris v. New York, 401 U.S. 222 (1971).

[4] *See, e.g.*, Dalia v. United States, 441 U.S. 238, 259 (1979) (Brennan, J., concurring in part, dissenting in part); Rakas v. Illinois, 439 U.S. 128, 156 (1978) (Brennan, White, Marshall, JJ., dissenting); United States v. Ramsey, 431 U.S. 606, 625 (1977) (Brennan, Marshall, Stevens, JJ., dissenting); United States v. Washington, 431 U.S. 181, 191 (1977) (Brennan, Marshall, JJ., dissenting); United States v. Donovan, 429 U.S. 413, 445 (1977) (Brennan, Marshall, JJ., dissenting in part); Stone v. Powell, 428 U.S. 465, 502 (1976) (Brennan, Marshall, JJ., dissenting); South Dakota v. Opperman, 428 U.S. 364, 384 (1976) (Brennan, Stewart, Marshall, JJ., dissenting); Andresen v. Maryland, 427 U.S. 463, 484, 493 (1976) (Brennan, Marshall, JJ., dissenting); United States v. Watson, 423 U.S. 411, 433 (1976) (Brennan, Marshall, JJ., dissenting); United States v. Peltier, 422 U.S. 531, 544 (1975) (Brennan, Marshall, JJ., dissenting); United States v. Edwards, 415 U.S. 800, 809 (1974) (Douglas, Brennan, Stewart, Marshall, JJ., dissenting); United States v. Matlock, 415 U.S. 164, 188 (1974) (Brennan, Marshall, JJ., dissenting); United States v. Calandra, 414 U.S. 338, 355 (1974) (Douglas, Brennan, Marshall, JJ., dissenting); Cupp v. Murphy, 412 U.S. 291, 297, 305 (1973) (Marshall, J., concurring) (Brennan, J., dissenting in part); Schneckloth v. Bustamonte, 412 U.S. 218, 276, 277 (1973) (Brennan, Marshall, JJ., dissenting); United States v. Russell, 411 U.S. 423, 439 (1973) (Brennan,

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The reader should not conclude that this different perspective on the exclusionary rule is an unexpected turnabout in jurisprudence. Despite the fact that the United States Supreme Court utilized it for over half a century, the bar has never shown strong support for the rule and most law journal articles written about the exclusionary rule are critical of it.[5]

The Chief Justice has indicated that he would like to do away with the exclusionary rule,[6] and recent Court cases have narrowed the scope of the rule.[7] We are deeply concerned about this trend and

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Stewart, Marshall, JJ., dissenting); United States v. Dionisio, [illegible] 1, 31 (1973) (Marshall, J., dissenting); Adams v. Williams, 407 U.S. 143, 151, 152 (19[illegible]s, Brennan, Marshall, JJ., dissenting); United States v. Harris, 403 U.S. 573, 586 ([illegible]'as, Harlan, Brennan, Marshall, JJ., dissenting); United States v. White, 401 U.S. 745, 755, 795 (1971) (Brennan, J., concurring) (Marshall, J., dissenting).

[5] *See, e.g.*, Burns, *Mapp v. Ohio: An All American Mistake*, 19 DE PAUL L. REV. 80 (1969) [hereinafter cited as Burns]; Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1 (1975); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) [hereinafter cited as Friendly]; Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUD. 66 (1978); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391 (1965) [hereinafter cited as LaFave]; LaFave & Remington, *Controlling the Police: The Judge's Roles in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939) [hereinafter cited as Plumb]; Schaefer, *The Fourteenth Amendment and the Sanctity of the Person*, 64 NW. U.L. REV. 1 (1969); Waite, *Evidence—Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679 (1944); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922); Wilkey, *Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUD. 214 (1978); Note, *Modern Approaches to the Fourth Amendment: The Reconciliation of Individual Rights With Governmental Interests*, 39 LA. L. REV. 623 (1979); Note, *Impending "Frontal Assault" on the Citadel: The Supreme Court's Readiness to Modify the Strict Exclusionary Rule of the Fourth Amendment to a Good Faith Standard*, 12 TULSA L.J. 337 (1976); Note, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUD. 74 (1974).

For a more objective but still critical treatment of the exclusionary rule, see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks]. *See also* Y. KAMISAR, W. LAFAVE & J. ISRAEL, BASIC CRIMINAL PROCEDURE 189 (1974).

For a good example of the attitude lurking behind much of this literature, see Plumb, *supra*. Plumb says that the victim of such a search will still have his day in court and will have the opportunity to present counter evidence to the jury. "[T]he defendant, as in all cases, must raise a reasonable doubt of his guilt." Plumb, *supra* at 372. The problem, of course, is that if our adversary system of criminal justice is working properly, the defendant should not have the burden of raising a reasonable doubt. Rather, the prosecution has the burden of proving guilt beyond all reasonable doubt. When one begins with the proposition that an accused is guilty until he establishes reasonable doubt, then indeed it is difficult to justify a concept like the exclusionary rule.

[6] Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411, 420-21 (1971) (Burger, C.J., dissenting).

[7] *See, e.g.*, Dalia v. United States, 441 U.S. 238, 247-48 (1979) (courts will not exclude electronic surveillance evidence gained under the auspices of a warrant where agents had to

the lack of support for the rule among members of the legal profession. Our perspective is that the exclusionary rule not only has merit, but that it is indispensable to our constitutional democracy. By constitutional democracy we mean a democracy in which the Constitution protects a wide variety of personal rights, and consequently, the government, as the instrument of the majority, is restrained in some instances. The exclusionary rule has been invoked most frequently to protect fourth amendment rights, and the rule is most vigorously defended when it relates to issues of search and seizure. This should not be interpreted as the writers' lack of support for its application in other areas, but rather as an editorial choice dictated by constraints of time and space.

The basic criticism of the exclusionary rule is that although it was meant to deter the police from conducting unreasonable searches and seizures, it has not been an effective deterrent.[8] Other major criticisms of the exclusionary rule are as follows: it is a misplaced and unfairly applied retributive sanction;[9] any benefits of the rule are enjoyed only by the guilty while it affords no protection for the innocent;[10] its application results in releasing countless known criminals to continue their lawlessness;[11] there exist a number of potentially successful alternative remedies for violations of rights;[12] the

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break and enter in order to execute the warrant); Rakas v. Illinois, 439 U.S. 128, 137-38 (1978) (narrowed the scope of whom the exclusionary rule protects); United States v. Donovan, 429 U.S. 413, 443 (1977) (omitting names from warrants does not violate the fourth amendment requirement of "particularly describing . . . the persons . . . to be seized"); Stone v. Powell, 428 U.S. 465, 481-82 (1976) (limited the circumstances under which federal courts can review fourth amendment claims via *habeas corpus*); South Dakota v. Opperman, 428 U.S. 364, 372-76 (1976) (broadened the universe of reasonable searches); Andresen v. Maryland, 427 U.S. 463, 480-82 (1976) (warrants no longer must meet the fourth amendment requirement of "particularly describing the place to be searched and . . . things to be seized"); United States v. Janis, 428 U.S. 433, 447 (1976) (resurrected the silver platter doctrine for federal prosecutions under the Internal Revenue Code-noncriminal cases); United States v. Calandra, 414 U.S. 339, 351 (1973) (the exclusionary rule does not apply to grand jury hearings); United States v. Robinson, 414 U.S. 218, 235 (1973) (broadened the definition of a legal search incident to a lawful arrest); United States v. White, 401 U.S. 745, 749 (1971) (broadened the scope of admissible electronically seized evidence); Harris v. New York, 401 U.S. 222, 224 (1971) (evidence otherwise excludable under the exclusionary rule can be admitted at trial to impeach the credibility of the defendant).

[8] S. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence 50-60 (1977) [hereinafter cite as Schlesinger].

[9] Oaks, *supra* note 5, at 726.

[10] Schlesinger, *supra* note 8, at 47.

[11] *Id.* at 60-61.

[12] *Bivens*, 403 U.S. at 421-22 (Burger, C.J., dissenting).

rule prompts rather than deters official lawlessness;[13] and other respected and democratic nations do not use the rule.[14] This comment will proceed by challenging the assumptions that the primary purpose of the exclusionary rule is to deter and that as a deterrent it is ineffective. We will criticize other common objections to the exclusionary rule and conclude by placing the conflict over the rule into a broad democratic perspective.

THE PURPOSE OF THE EXCLUSIONARY RULE IS DETERRENCE

The current constitutional test for application of the exclusionary rule is to speculate whether a particular application of the rule will produce deterred police behavior in the future.[15] This test, along with its underlying theory, *i.e.*, that the primary purpose of the rule is deterrence, is of recent vintage and is peculiar to the Burger Court. Indeed, the exclusionary rule was an active Court doctrine for nearly fifty years before any mention of deterrence.[16]

In adopting the exclusionary rule for the federal court system in 1914, Justice Day justified the rule in terms of democratic principles and did so eloquently by quoting Justice Bradley's 1886 opinion in *Boyd v. United States*:[17]

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[18]

For the next forty-five years the Court's test for whether or not to invoke the rule was a reasonableness test.[19] Since the fourth amendment forbids unreasonable searches and seizures, the Court applied the exclusionary rule in those circumstances where it determined that the search was unreasonable.[20] In none of those cases is there any mention of deterrence. Rather, the justification for excluding tainted evidence is rooted in democratic principles as the following few examples suggest.

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[13] Oaks, *supra* note 5, at 699, 739-40.

[14] *Id.* at 701-06.

[15] Stone v. Powell, 428 U.S. at 492.

[16] The initial mention of deterrence can be found in Elkins v. United States, 364 U.S. 206, 217 (1960).

[17] Boyd v. United States, 116 U.S. 616 (1886).

[18] Weeks v. United States, 232 U.S. 383, 393 (1914).

In 1921 Justice Clarke described the fourth and fifth amendment protections as, "[t]he very essence of constitutional liberty." The Court ruled that tainted evidence should be excluded to further the "[f]ull enjoyment of personal liberty and private property."[21] Five years later, in *Byars v. United States*,[22] Justice Sutherland, writing for the majority, argued that illegally seized evidence should be excluded because "to hold [otherwise] would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official action."[23] In 1931 Justice Butler stated for the Court in *Go-Bart Improving Co. v. United States*[24] that government searches outside the limits of the fourth amendment are "obnoxious to fundamental principles of liberty," and that courts "owe the duty of vigilance for its effective enforcement."[25]

After thirty-four years of federal court enforcement of the exclusionary rule there was no mention of deterrence. In 1948, addressing the problem of warrantless searches, the Court, in *Johnson v. United States*,[26] stressed that exclusion does not deprive law enforcement officers from making "the usual inferences which reasonable men may draw from evidence," but simply requires that a detached magistrate be convinced of those inferences.[27] In that same case, the Court, in very stark and dramatic language, stated the following fundamental justification for the exclusionary rule:

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[19] *See* Carroll v. United States, 267 U.S. 132 (1925); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[20] Rochin v. California, 342 U.S. 165 (1952); Johnson v. United States, 333 U.S. 10 (1948); United States v. Lefkowitz, 285 U.S. 452 (1932); Taylor v. United States, 286 U.S. 1 (1932); Go-Bart Improving Co. v. United States, 282 U.S. 344 (1931); Byars v. United States, 273 U.S. 28 (1927); Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).

[21] Gouled v. United States, 255 U.S. at 303-04.

[22] Byars v. United States, 273 U.S. 28 (1927).

[23] *Id.* at 33.

[24] Go-Bart Improving Co. v. United States, 282 U.S. 344 (1931).

[25] *Id.* at 357.

[26] Johnson v. United States, 333 U.S. 10 (1948).

> An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers, and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.[28]

It is clear that the justification or primary purpose of the exclusionary rule was *not* deterrence but rather to enhance constitutional liberty and to reassure the people that government lawlessness would not be rewarded by an independent judiciary. By 1949 the exclusionary rule doctrine was fairly well settled law. Searches and seizures were automatically unreasonable if there was no warrant, except in those circumstances immediately incidental to a lawful arrest.[29] Warrants had to be issued on adequate grounds, be specific and be issued by a detached judicial officer.[30] Federal courts could, however, admit evidence not meeting the above requirements if it were obtained by state agents.[31]

The first mention of deterrence as a principle behind the exclusionary rule was expressed by Justice Stewart in *Elkins v. United States*.[32] Indeed, in recent Court opinions the statement is frequently made that the reason for the exclusionary rule is deterrence and *Elkins* is cited.[33] However, deterrence was only one of three justifications discussed in *Elkins* for invoking the exclusionary rule in federal courts for illegally seized state evidence. The other two reasons were to enhance federalism and constitutional democracy. In terms of deterrence, Justice Stewart's opinion pointed out that the Court had been hinting[34] to the states to find some way to control illegal searches and many of the states had done nothing in that respect. Therefore, as a last resort the Court was invoking the exclusionary rule to discourage state officers from obtaining illegal evidence and turning it over to federal officers.

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[27] *Id.* at 11.

[28] *Id.* at 17.

[29] Trupiano v. United States, 334 U.S. 699 (1948).

[30] Johnson v. United States, 333 U.S. at 13-14.

[31] For several examples of reasonable searches during this period, see Breithaupt v. Abram, 352 U.S. 432 (1957); Irvine v. California, 347 U.S. 128 (1954); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Zap v. United States, 328 U.S. 624 (1946); Davis v. United States, 328 U.S. 582 (1946); Carroll v. United States, 267 U.S. 132 (1925).

[32] Elkins v. United States, 364 U.S. 206, 217 (1960).

[33] More accurately, *Elkins* is cited when the Justices feel the need to lend legal support to the theory—and frequently they feel no such compulsion. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. at 411-27 (Burger, C.J., dissenting). *See also* Brewer v. Williams, 430 U.S. 387 (1977); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414

Another reason for invoking the exclusionary rule in the *Elkins* case was that it would enhance federalism.[35] Prior to this ruling there was a bizarre state of affairs in those states which had adopted the exclusionary rule. Even though neither state nor federal courts would admit illegal evidence obtained by officials under their jurisdiction, they would admit such evidence obtained by officials beyond their jurisdiction.[36] Hence, even though they could not use it in their own courts, state officials were encouraged to gather tainted evidence and turn it over to federal officials.[37]

Where, then, does the present Court get the notion that the primary purpose of the exclusionary rule is deterrence? Most probably this comes from a few cases decided during the 1960's involving the vexing question of retroactivity. The concept of retroactivity involves questions similar to the following: if the Court pronounced the *Mapp* doctrine in 1961,[38] should the Court then apply that doctrine to those convicted on illegally seized evidence prior to 1961? In *Linkletter v. Walker*,[39] the Court declared that the purpose of the exclusionary rule was to deter and refused to make the *Mapp* doctrine retroactive on the basis that to do so would not have a deterrent effect. The Court reached similar conclusions in *Fuller v. Alaska*[40]

U.S. 338 (1974); Harris v. New York, 401 U.S. 222 (1971) (*see* both the majority opinion and the Chief Justice's dissent).

[34] *See generally* Wolf v. Colorado, 338 U.S. 25 (1949).

[35] *Elkins*, 364 U.S. at 221-22.

[36] *Id.* at 210-11.

[37] *Id.* at 212-13.

[38] Mapp v. Ohio, 367 U.S. 643 (1961).

[39] Linkletter v. Walker, 381 U.S. 618 (1965).

[40] Fuller v. Alaska, 393 U.S. 80 (1968). In *Fuller*, the Court made prospective application of the doctrine in Lee v. Florida, 392 U.S. 378 (1968). That is, state evidence obtained in violation of § 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1976), should be excluded at trial, but only for those defendants whose trial succeeds the decision in *Lee*.

and *Desist v. United States*.[41]

As the prior discussion indicates, there simply was no precedent for the Court's justification in *Linkletter*. In defense of the Court, however, the question of retroactivity is a particularly troublesome one. The Court was making bold progressive steps toward safeguarding the constitutional rights of those accused of crimes during this period. Consequently, the Court was under considerable attack for "turning loose" individual "criminals" (*e.g.*, Messrs. Escobedo, Miranda, Katz, Gideon, and Ms. Mapp).[42] One can only speculate what would have happened to the prestige of the Court had it followed retroactivity precedent and released hordes of convicted criminals loose on society. The Court has had particular difficulty agreeing on a retroactivity policy, and the *Linkletter* decision was just the first in a long line of politically difficult decisions for the Court.[43] We would argue, given the paucity of any mention of deterrence in previous exclusionary rule cases, that in terms of the Court's prestige deterrence was raised in *Linkletter* for the political reasons discussed above.

That the primary purpose of the exclusionary rule is deterrence and that it is ineffective in that regard was most clearly voiced by Chief Justice Burger in his famous dissent in *Bivens v. Six Unknown Named Agents*.[44] Without citing any supporting cases, the Chief Justice declared, "It is clear, however, that . . . [t]he exclusionary rule has rested on the deterrent rationale . . . ."[45] Thus, disregarding fifty-five years of clear precedent, the Chief Justice dismissed the democratic principles supporting the exclusionary rule:

> Under one of these alternative theories the rule's foundation is shifted to the 'sporting contest' thesis that the government must 'play the game fairly' and cannot be allowed to profit from its own

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[41] Desist v. United States, 394 U.S. 244 (1969). In *Desist*, the Court made the doctrine in Katz v. United States, 389 U.S. 347, 349 (1967), applicable only to those cases in which the electronic surveillance occurred after December 18, 1967.

[42] *See* Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[43] For an excellent discussion of the problem of retroactivity, see Peltier, *Retroactivity and the Exclusionary Rule: When do the Policies Underlying the Exclusionary Rule Warrant Its Retroactive Application?*, 13 AM. CRIM. L. REV. 317 (1975).

[44] Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

[45] *Id.* at 415.

> illegal acts . . . . But the exclusionary rule does not ineluctably flow from a desire to ensure that government plays the 'game' according to the rule.[46]

Two years after *Bivens*, the Chief Justice's dissent became Court doctrine.[47]

Despite the jurisprudential preferences of several of the present members of the Court, a fair study of the history of the exclusionary rule reveals that the purpose behind it was not deterrence. Rather, the underlying principle is indeed what the Chief Justice scoffingly referred to as the government playing the "game" fairly. The deterrence theory is of relatively recent vintage and, except for the aberration of the retroactivity cases, has never been the principle accepted by the Court until 1973.

THE EXCLUSIONARY RULE IS NOT AN EFFECTIVE DETERRENT

As indicated above, the first criticism of the exclusionary rule as a deterrent comes from the Chief Justice in *Bivens*. "Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it. . . . But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials."[48] This is a curious position for the Chief Justice to take *vis-a-vis* his philosophy on deterrence as explicated in *Furman v. Georgia*.[49] In *Furman*, the Chief Justice argued that we should proceed on the assumption that capital punishment *does* deter and let those who would change the law prove empirically that it does not deter.[50] He adds that in any case inquiries of "that kind" are beyond the scope of judicial review.

One could, of course, dispense with the argument of whether or not the exclusionary rule deters by stating that it really makes no difference. Since the real purpose of the rule is to put some "teeth" into the fourth amendment by ensuring that the people are secure in their persons, houses and effects, its deterrent effect is superfluous.

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[46] *Id.* at 414.

[47] *See* United States v. Calandra, 414 U.S. 338 (1974).

[48] *Bivens*, 403 U.S. at 416 (Burger, C.J., dissenting).

[49] Furman v. Georgia, 408 U.S. 238 (1972).

[50] *Id.* at 395-96.

So long as courts vigorously exclude evidence gained outside the mandate of the fourth amendment its purpose is furthered.

Alternatively, one could apply the Chief Justice's logic on deterrence in *Furman v. Georgia* to the exclusionary rule. That is, we should assume that it does deter until those who wish to change the law prove empirically that it does not. Since such empirical evidence is lacking there is nothing left to discuss. However, that approach avoids the issue, and we believe that at present the exclusionary rule does deter and with more vigorous enforcement it could be even more effective.

While there have been many articles written on the exclusionary rule, there have been few empirical studies that address the deterrence question. Perhaps the most thorough treatment of this subject is the 1970 article of Oaks,[51] in which he criticizes and synthesizes all of the empirical studies in an attempt to reach a definite conclusion on whether the exclusionary rule has a deterrent effect upon law enforcement officials. His conclusion is that

> [I]llegal searches and seizures seem to be concentrated in a few types of crimes, notably weapons and narcotics offenses. The data contains little support for the proposition that the exclusionary rule discourages illegal searches and seizures [in the two areas cited above] but it falls short of establishing that it does not [deter].[52]

In a later article, Canon contends that many of the empirical studies are based upon biased assumptions and that virtually all are methodologically insufficient.[53] Canon's article is more positive about the deterrent effect of the rule than is Oaks' article. The conclusion which all knowledgeable scholars have reached based on this research was summed up by Chief Justice Burger, who indicated that the empirical evidence is inconclusive.[54] In short, it is not known empirically whether the exclusionary rule has a deterrent effect.

Common sense (supported by some empirical evidence) tells us that under certain circumstances it does not deter. Obviously, where the object of police activity is not a trial and conviction there is no motivation to fear the consequences of the exclusionary rule. By the same token, the increasing usage in the station house of the term "righteous bust"[55] indicates that ordinary policemen are aware and affected by the exclusionary rule and that their official behavior is guided by it.

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[51] Oaks, *supra* note 5.

[52] *Id.* at 667.

[53] Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1973-74) [hereinafter cited as Canon].

[54] SCHLESINGER, *supra* note 8; Canon, *supra* note 53; Oaks, *supra* note 5; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973).

If the rule is not an efficient deterrent it is not because of any inherent deficiency in the rule, but rather because of selective invocation of it by the courts. The case of *Hill v. California*[56] provides a good example. California police stopped a car for a moving violation and observed objects reported stolen in the back seat. Upon proper questioning, the suspects admitted taking part in recent robberies and implicated Hill who was not in the car. Up to this point everything was proper. There was probable cause to stop the car in the first instance; the stolen objects were in plain view; and there followed a valid arrest and probable cause to suspect Hill. At this point, however, the police did not bother to obtain either an arrest or search warrant. Instead, they went straight to the address given as Hill's, gained entry, searched the premises and seized more stolen evidence. The police arrested a man who they believed to be Hill, but who in reality was not. When this case went before the Supreme Court, the Court said that the warrantless search and arrest constituted no violation of the fourth amendment.[57] It is precisely against short cuts such as these that the exclusionary rule should be invoked as this is clearly the type of behavior the fourth amendment was meant to inhibit. We suggest that if the courts would adamantly and consistently invoke the exclusionary rule it would be a more effective deterrent. As it now stands, however, the police will take their cue from the Supreme Court in cases like *Hill* and wink at the requirements of the fourth amendment and the exclusionary rule.

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[55] Righteous bust refers to an arrest made within the dictates of the fourth and fifth amendments that will not result in exclusion of evidence in court due to lack of proper procedure.

[56] Hill v. California, 401 U.S. 797 (1971).

[57] *Id.* at 804-05.

OTHER CRITICISMS OF THE EXCLUSIONARY RULE

Continuing to erroneously cast suppression in the role of a criminal-like sanction, critics argue that as a form of retribution the effects of the exclusionary rule are misplaced and unfair.[58] More specifically, Chief Justice Burger and others contend that it is the prosecutor rather than the offending police who is punished by application of the rule;[59] the rule ignores the intent of the offender;[60] and it is a single invariable sanction applied without regard for the gravity of the offense.[61] The discussion above with regard to the intent of the exclusionary rule adequately disposes of the notion that it was designed with the intent to punish.[62] We submit that application of the rule does not serve as a form of retribution either intentionally or unintentionally.

Prosecutors are hardly sanctioned by exclusion. The effects of the exclusion of evidence from trial might be described as troublesome, frustrating or perhaps embarrassing—as indeed it should be. The Constitution was intentionally designed to make law enforcement difficult, frustrating and troublesome. Easy law enforcement, unlimited by law, is a characteristic much more common to totalitarian states than to democracies. Prosecutors deservedly are embarrassed at losing cases when evidence is found to be illegally obtained. Exclusion is not at fault. Rather, both the lawlessness of the police and the prosecutor's complicity in that lawlessness are to blame. It is no less obscene and abusive for prosecutors to attempt to convict people on the basis of illegal evidence than for police to illegally seize that evidence.

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[58] *Bivens*, 403 U.S. at 416-19 (Burger, C.J., dissenting); United States v. Peltier, 422 U.S. 531, 544 (1975) (Brennan, J., dissenting); People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587-88 (1926); SCHLESINGER, *supra* note 8, at 61-62; Friendly, *supra* note 5, at 951-52; Oaks, *supra* note 5, at 726.

[59] *Bivens*, 403 U.S. at 416-17 (Burger, C.J., dissenting); Oaks, *supra* note 5, at 726.

[60] Justice Cardozo lamented the effects of the rule in instances when "the constable has blundered." People v. Defore, 242 N.Y. at 21, 150 N.E. at 587-88. More recently, this argument has been made pointing to the rule's sanction of intentional and inadvertent violations in precisely the same manner. *See, e.g.*, United States v. Peltier, 422 U.S. 531, 544 (1975) (Brennan, J., dissenting); *Bivens*, 403 U.S. at 418-19 (Burger, C.J., dissenting); SCHLESINGER, *supra* note 8, at 61-62; Friendly, *supra* note 5, at 951-53.

[61] *See, e.g.*, *Bivens*, 403 U.S. at 419 (Burger, C.J., dissenting). The Chief Justice proposes that using exclusion as the sole and invariable sanction for illegally seizing evidence is similar to a blanket "shoot to kill" order. While such an order may be tolerable "to prevent the escape of a convicted killer," such an order is not appropriate in the case of "a car thief, a pick pocket or a shoplifter." More amusing yet is his analogy of the criminal acts of freeing "a tiger or a mouse in a schoolroom," each of which must be treated differently. *See also* Friendly, *supra* note 5, at 952.

[62] *See* text accompanying notes 28-29, 33-35 *supra*.

Assume for the moment that an unintended consequence of the exclusionary rule is a mild or occasional punishment. Can the rule, therefore, be condemned because it ignores the seriousness of the sanctioned offense, or because the offense may have been unintended? One might justifiably wonder how seriously these criticisms are urged by their own proponents. If critics would cast exclusion into a criminal-like atmosphere, why do they not further urge wholesale application of due process to the determination of police culpability? The answer is that they know—as well they should—that suppression is not a criminal sanction. Further, they should recognize the enormity of the difference between the act of a private individual and the unconstitutional behavior of one acting in the name of and with the cumulative force of the government. That difference is not one of degree but one of kind.

No language or meaning in the Constitution excuses minor or inadvertent violations of rights. However much one might wish that the fourth amendment protected only *intentionally* and *substantially* unreasonable searches and seizures, it does not. The impact of governmental intrusion into the privacy of the individual is awesome even when justified as reasonable intrusions. Exclusion correctly addresses minor, serious, accidental and intended violations of rights in a uniform fashion by protecting those rights violated from any possible harmful consequences beyond the actual intrusion.

Another major objection to the exclusionary rule relies correctly upon its intent to protect individuals from possible injurious consequences of official lawlessness. Critics of the rule, however, perceive that any benefits of its application accrue only to the guilty, and that it affords no protection to the innocent.[63] Meeting this objection is disturbing because to do so requires reminding serious legal scholars and judges in our highest courts of the fundamental nature of our system of criminal justice. Had persons with no legal background advanced this argument it would be only slightly less objectionable.

Probably no principle of criminal law is more important to our adversary system than the presumption of innocence, and that we refrain from attaching the "guilty" label until one has been found guilty beyond a reasonable doubt by a judge or jury following a fair and legal judicial proceeding. Hopefully, what is *really* meant by those who perceive suppression to be a protection only for the guilty is that it protects only those who are accused of a crime and against whom some incriminating evidence exists.

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[63] *See, e.g.*, *Bivens*, 403 U.S. at 413 (Burger, C.J., dissenting); SCHLESINGER, *supra* note 8, at 47, Oaks, *supra* note 5, at 736-39.

If this objection really means that the rule only protects those who in the absence of the exclusionary rule would probably be found guilty then the objection is no closer to the truth. It is no secret that in spite of constitutional protections, we frequently convict and punish perfectly innocent people.[64] Let us assume that suppression really did protect only those who had indeed engaged in criminal activity. Even under those circumstances no reasonable case could be made for abandoning the rule. It was intended to give force to the promise that *the people* would be free from unreasonable searches and seizures. The fourth amendment makes no distinction among people, but it does provide for reasonable performance of searches and seizures in cases where it can be established that someone has probably committed a crime. To urge abandonment of the exclusionary rule on the grounds argued here is evidence of an impoverished notion of justice and lack of general support for "hard-won" constitutional rights.

Exclusion is popularly reputed to render law enforcement excessively difficult and therefore to turn known criminals loose to prey on society.[65] In free societies it is inevitably difficult to convict and punish criminals. If we wish to enforce the criminal law at all costs, then we should altogether abandon the Constitution and use our available resources and technology to rid ourselves of nearly all forms of criminality and deviance. The price of freedom, then, is suffering with some level of criminal behavior. Those who would argue that the price is too high are not only devaluing our general level of liberty, but more seriously that of certain members of society. We suspect that the price would be most dearly paid by the nonwhite, the poor, the young and those with other than traditional life styles. Those with the least ability to protect themselves at present could easily lose the protection of the Constitution as well.

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[64] E. BORCHARD, CONVICTING THE INNOCENT (1970). Sixty-five selected cases are analyzed in which persons convicted of crimes were later shown to be innocent after many years of imprisonment.

[65] *See Bivens*, 403 U.S. at 413 (Burger, C.J., dissenting); SCHLESINGER, *supra* note 8, at 60-61; Friendly, *supra* note 5, at 953; Oaks, *supra* note 5, at 736-39, 753.

Enforcement of the criminal law is important to a free society, but many improvements are possible within the context of the Constitution.[66] Professionalization of police, better coordination among law enforcement personnel, increased resource allocation to criminal justice agencies and especially the courts, as well as fuller cooperation between the police and the public are more preferable to the loss of rights. Dollars, time and concern are better spent than our constitutionally protected freedoms.

Critics of exclusion would lead us to believe that its practice has a very great impact on our ability to punish criminals.[67] This idea has more intuitive appeal than truth. It is not unfair to estimate that forty to fifty percent of all occurrences of violent and property crimes do not become known to the police,[68] and of those that do become known, about twenty-two percent are cleared by arrests.[69] Of these, seventy-five percent are prosecuted and seventy-one percent of those cases result in convictions.[70] As a proportion, of all crimes committed in the United States, those cases which are prosecuted but result in findings other than guilt are probably about three percent.[71]

Discounting this figure by taking into account the many possible reasons for courts' failure to convict—including the real possibility of the innocence of the accused—exclusion accounts for a minute proportion of criminal acts that go unpunished. Thus, the view that the exclusionary rule turns hordes of hardened criminals loose on society is simply an illusion. However, there are hordes of criminals on the streets because of the refusal of people to report crimes and to cooperate with police in their detection. Law enforcement agencies are understaffed, frequently unprofessional or not professional enough and are lacking in adequate resources. These are problems capable of solution without resort to official lawlessness.

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[66] The city of Dallas, Texas, for example, has instituted a Legal Liaison Division in its police department to afford, among other services, immediate legal advice to officers on patrol. Since operations began, significantly reduced numbers of errors on the part of police resulting in exclusion have been experienced there. *See* 6 LEAA NEWSLETTER 5 (Aug. 1977).

[67] *Bivens*, 403 U.S. at 411-24 (Burger, C.J., dissenting); F. INBAU, J. THOMPSON, J. HODDAD, J. ZAGES & G. STARKMAN, CRIMINAL PROCEDURE: CASES AND COMMENTS 162 (1974); J. KAPLAN, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 205 (1978); P. LEWIS & K. PEOPLES, THE SUPREME COURT AND THE CRIMINAL PROCESS: CASES AND COMMENTS 197 (1978); SCHLESINGER, *supra* note 8, at 47-63.

[68] *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 20-22 (1967). This conclusion is substantiated more recently in LAW ENFORCEMENT AND ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 20 (1977). The Department reports that only commercial crimes and auto theft are reported more frequently than 53% of the time. Crimes of larceny against persons and households are reported only about 27% of the time.

[69] FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, 1977 (1977).

[70] *Id.*

[71] This is the mathematical result using the arrest, prosecution and conviction data above and assuming liberally that 60% of crimes become known to the police.

Closely related to the idea that exclusion constitutes a very costly solution to violations of the fourth amendment is the assertion that there exists a number of potentially more successful and less costly remedies. Most commonly suggested are criminal sanctions to be imposed upon violators and civil remedies against individual officers and their agencies.[72] If the intended impact of these remedies is deterrence through their identifying and punishing offenders, there is reason for at least tentative optimism. These remedies, however, should supplement rather than replace the exclusionary rule since they themselves have some limitations. We enthusiastically urge enactment of and experimentation with means for enforcing the rights of the fourth amendment. However, in the absence of exclusion, many wrongs may not become known. Accordingly, the courts will hardly be in a position to protect people from the ill effects of the violations. Further, many such remedies would necessarily be initiated from prison cells and by convicted persons hardly capable of provoking public or official sympathy.

Chief Justice Burger's discussion to this point is most interesting. In the *Bivens* case, he attacks exclusion as impotent because law enforcement agencies do not sanction acts resulting in exclusion and points to the unlikelihood of convicting or finding against violating police.[73] Prosecutors, judges and juries are unlikely to take the side of an obviously guilty defendant against that of the police.[74] He proposes that Congress, on the other hand, should enact procedures for civil and criminal remedies,[75] the very means which he previously assured us are not and cannot be effective. Although the Chief Justice has indicated that he does not intend to abandon the exclusionary rule until other more effective remedies are available,[76] we are not persuaded. The case might be easily made that establishment of other remedies would merely justify accomplishment of his major goal: the demise of the bothersome exclusionary rule.

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[72] *Bivens*, 403 U.S. at 421-22 (Burger, C.J., dissenting); SCHLESINGER, *supra* note 8, chap. 4; LaFave, *supra* note 5, at 392.

[73] *Bivens*, 403 U.S. at 416 (Burger, C.J., dissenting).

[74] *Id.* at 421-22.

[75] *Id.* at 422-24.

Some evidence suggests that exclusion prompts official lawlessness rather than discouraging it. It is argued that in order to succeed in convicting those they arrest, police blatantly commit perjury in reporting the circumstances surrounding searches and arrests.[77] Police, knowing conviction is unlikely under certain circumstances, may impose extralegal sanctions in brutal and destructive forms.[78] They may in fact purposely use illegal searches as a method of immunizing selected persons from criminal prosecution.[79] Some judges may also abuse the rule by avoiding imposition of non-discretionary sentences[80] or in issuing questionable warrants knowing that the probable cause question will be more carefully reviewed should the case go to trial.[81]

These arguments hardly address the rule itself but are rather a serious indictment of the criminal justice system and its personnel. Any procedural rule is capable of being abused by those who attempt to circumvent it. That circumventing the rule results in corruption points to the need for additional protections against abuse, but does not itself condemn the rule. It is in corrupt and abusive systems that such protections as the exclusionary rule are most needed. In a system in which lawfulness is paramount and individual rights readily observed the rule is less necessary.

The fact that suppression of illegally seized criminal evidence is within the constitutional authority of the courts has not been seriously questioned. Critics of the exclusionary rule, however, assume and sometimes explicitly argue that it is a judicially created rule of evidence, destructible at the will of the Supreme Court.[82] Although the genesis of the rule hardly compels any conclusion with regard to its future fate, its defense is strengthened by its close ties to the Constitution. The Supreme Court has not consistently held that the exclusionary rule is required by the Constitution itself. While the very language of the fourth amendment does not mention exclusion, it is certainly consistent with its meaning.

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[76] *Id.* at 420.

[77] Burns, *supra* note 5, at 96; Oaks, *supra* note 5, at 699, 739-40.

[78] LaFave, *supra* note 5, at 422; Oaks, *supra* note 5, at 750-52.

[79] Oaks, *supra* note 5, at 749-50.

[80] LaFave, *supra* note 5, at 405.

[81] *Id.* at 412.

[82] A majority of the Burger Court is certainly of this opinion. The Chief Justice is most

Critics of exclusion recognize that a major argument made in support of the rule is that it assures the basic integrity of criminal proceedings and lends a spirit of fair play to the process. Although recognizing the existence of the argument, they are rather cavalier in dismissing its importance.[83] A notable exception to this evasiveness is their mention that many highly regarded legal systems in other free and democratic nations do not use exclusion.[84] History is replete with examples of nations borrowing and lending institutions and practices, but no sovereign state is obligated to do so. The peculiarities of a nation's history, culture, values and needs should guide its legal practices and not international consensus. It is no less reasonable to insist that all other nations adopt exclusion than to argue that the United States abandon the practice because others will not adopt it.

America's legal system is understandably different from many others. The nature of the relationship between law enforcement officers and the public is very different here than in much of the world.[85] Attitudes of American police officers with regard to the role of procedural rules and individual rights are notably less admirable than in some other countries.[86] Our courts are not empowered to

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outspoken about rejecting the doctrine of Mapp v. Ohio, 367 U.S. 643 (1961). In *Mapp*, the Court held that the fourth and fifth amendments are inseparably tied and that the exclusionary rule is demanded by their meaning. For Chief Justice Burger's argument, see *Bivens*, 403 U.S. at 414 (Burger, C.J., dissenting).

[83] Chief Justice Burger, in *Bivens*, dismisses the argument equally easily in a single sentence. "But the exclusionary rule does not ineluctably flow from a desire to ensure that the government plays the 'game' according to the rules." 403 U.S. at 414 (Burger, C.J., dissenting). Oaks, *supra* note 5, at 669, dismisses the argument as follows: "Although the normative justification that the Supreme Court has referred to as the 'imperative of judicial integrity' continues to appear in the rhetoric of Supreme Court decisions, it is doubtful that this argument decides cases."

[84] In *Bivens*, the Chief Justice makes this argument and cites further references to this point. 403 U.S. at 415 (Burger, C.J., dissenting). *See also* Oaks, *supra* note 5, at 701-06.

[85] *E.g.*, M. Banton, The Police in the Community 227-40 (1964).

[86] Oaks, *supra* n[illegible] at 701-06, explores such attitudes in American and Canadian police.

perform investigatory functions, but only to resolve cases by deciding real controversies. In criminal cases the defendant is hardly in the hands of those charged with finding the truth. Rather, he is the captive of those whose explicit duty and intent is to assure that he is found guilty. In inquisitorial systems the additional advantages afforded the defendant in adversary proceedings are less necessary to assure justice. If exclusion is unique to the United States so are many of the circumstances which prompted its original and continued use here.

It is incumbent upon those who would change an important and established principle of law to demonstrate the necessity and wisdom of that change. Criticisms of the exclusionary rule do not accomplish that task. Not only are they incorrect, but they have ignored the role of the rule in a society guided by democratic principles. Defeating all objections to exclusion is therefore less important than disclosing its essential relation to a democratic political environment. To that task we now proceed.

THE EXCLUSIONARY RULE AS A CONSTITUTIONAL DEMOCRATIC DOCTRINE

Arguments against the exclusionary rule have proceeded from narrowly legalistic, pragmatic and short-term perspectives. What is needed is a more careful analysis of its present and future role in maintaining a free and democratic political atmosphere in America. The exclusionary rule has two major roles in a democratic society which together justify its continued use. One is its service in protecting individuals by limiting some of the potential consequences of illegal governmental activity. Another is that of a communicative device, teaching and reinforcing democratic values.

The notion of democracy prescribes that government exercise only that power which is lawfully delegated to it by the sovereign people and that official acts must be carefully limited by law. Individuals therefore maintain a high degree of autonomy with respect to their behavior, disposition of property, *etc*. Further, any person whose personal sphere of sovereignty is reduced or destroyed, whether by government or private parties, has the right to an appropriate remedy in order to restore his rights and to reduce or eliminate any unfavorable consequences of their violation. Such a remedy may take a variety of forms, but justice requires that, within the limits of possibility, the person's circumstances or life situation prior to the violation be restored. In the cases of some offenses, *e.g.*, murder or physical assault, no complete remedy is possible. However, because the remedy is not complete in some cases, the law is not relieved of the obligation to provide any possible or partial solution.

Consider the case of one whose privacy is unlawfully violated by an illegal search of his home during which some of his personal property is seized. Despite the apparent simplicity of such an occurrence, its implications are manifold. First, the officer invades the person's sphere of privacy. If the offending officer is permitted to divulge the details of the search in a public trial, he may as well invite any and all interested persons to accompany him on his unauthorized excursion. Further, the citizen has lost possession and control of some elements of his private environment (*i.e.*, property, papers, communication and effects) that he might reasonably have expected to retain privately. Such losses differ from those of other robberies or burglaries only in that they result from official rather than private action and are therefore even more odious. Finally, the victim is now vulnerable to the criminal law. If the fruits of the illegal search and seizure are used in evidence against him, he is much more likely than before to further suffer by being convicted of a crime and being punished. In short, the victim's life situation is significantly changed for the worse as a result of the illegal governmental action.

To what remedy or remedies is such a victim entitled? Justice demands that the law provide for the complete restoration of the former life situation. That is obviously impossible in this case. The fact of the violation is history and no mechanism is available to completely eliminate the embarrassment and inconvenience of the event. The law can and should, however, minimize the real and potential effects of the intrusion beyond those immediate to the act itself. The exclusionary rule is the single available remedy which is capable of performing this function. It limits the initial intrusion to those who actually perform the search by preventing public cognizance of illegally discovered objects and information. It requires return of these and prevents their use by the courts in imposing criminal conviction and sanctions.

Our assertion that the exclusionary rule is the only effective remedy available to those whose fourth amendment rights have been violated is not inconsistent with our earlier encouragement of the use of other solutions for other purposes. Other remedies are narrowly addressed at avoiding future violations by imposing sanctions on violators. Deterrence is a laudable goal but imposition of sanctions may not have such an effect.[87] Neither civil nor criminal sanctions are capable of restoring what has been referred to as the former life situation. Unless one argues that there is some satisfaction in knowing that a guilty party has suffered, criminal sanctions afford nothing to the injured party. Civil remedies may restore seized property or its value, but that can hardly compensate for the other losses mentioned above. Among the possible solutions for violations of the fourth amendment, only exclusion affords protection to those who have already suffered. Such persons are at least as much entitled to relief as are potential future victims.

It would hardly be desirable for any rule of law to afford an absolute right of privacy. Society has an important interest in entering the privacy of individuals when necessary to enforce the criminal law. Our Constitution recognizes that need and prescribes means by which law enforcement officers may legally serve this interest. On occasions when correct and reasonable searches and seizures occur, the exclusionary rule has no force and the government may perform the law enforcement function to its fullest legal extent. It is when government uses power illegitimately and ignores the dictates of the source of its own power that individuals need and are entitled to such remedies as the exclusionary rule.

The fact that most of our constitutionally defined rights are to some extent limited and must frequently be balanced against the rights of others is generally recognized. Critics of the exclusionary rule, however, have abused this principle. They would balance the rights mentioned in the fourth and other related amendments against the interest of society in enforcing the criminal law.[88] In recognition of this interest, governments are empowered to perform the law enforcement function. If this power or its exercise can be somehow conceived of as a right, then that right is rigorously defined and limited by the Constitution. It certainly does not include the right to break the law! It is hardly possible to balance rights against a power which is already carefully circumscribed in terms of those rights.

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[87] Among the finest short discussions of the deterrent effects and ethical implications of punishment is Andenaes, *The General Preventive Effects of Punishment*, 114 U. PENN. L. REV. 949 (1966). Here, it is argued that we can presently draw few sound conclusions about the efficaciousness of punishment.

We have argued that exclusion, in the role of a remedy to be invoked by those victimized by illegal searches, has immediate and specific effects. In its role as a communicative device, its impact is less dramatic and more general. The law and the behavior of government communicate important meanings to the public. Government has long been recognized as a great teacher of social values.[89] Although one might argue that this is an inappropriate function of government, it is the inescapable task of the government to arbitrate among conflicting interests and values. Unable to escape that function, government leadership must conscientiously anticipate the communicative effects of its decision and other behavior.

The Burger Court has three general alternatives with respect to the future of the exclusionary rule. It can continue to communicate an uncertain message by retaining the rule while failing to enforce it rigorously. We agree with Mr. Justice Brennan that this is the least desirable of possible courses.[90] Alternatively, the Court might abandon the rule or continue to enforce it strictly and invariably. It may prove enlightening to consider the communicative effects of each possible choice.

Two points relevant to this discussion must be kept in mind. First, the rule has been regularly applied for nearly sixty-five years in the federal courts and for at least seventeen in the states. During the period of its use, the courts have regularly communicated that they will not be parties to official lawlessness and will honor their sworn duty to uphold the provisions of the Constitution. They have taught us the important principles of the limited nature of government under law and the inviolability of the individual as he relates to government. Any decision about the fate of the exclusionary rule must be made in the context of these facts. Second, a change in the law has the potential for a more immediate and recognizable impact than maintaining the status quo. This has serious implications, especially for the abandonment option.

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[88] This balancing procedure is implied by most criticisms of the rule. Critics regularly cite Justice Cardozo's argument in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). Here, the issue is raised "whether protection for the individual would not be gained at the disproportionate loss of protection for society." *Id.* at 24, 150 N.E. at 588.

[89] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Mr. Justice Brandeis has been cited on numerous occasions by the Court in supporting the exclusionary rule.

[90] United States v. Peltier, 422 U.S. 531, 561-62 (1975) (Brennan, J., dissenting).

Consider the consequences of abandoning the exclusionary rule. In the context of its prior enforcement such an eventuality would necessarily mean that the courts would acknowledge and actively use the fruits of illegal police behavior. Further, the courts would announce that, although victims were once provided a partial remedy for their unjustly and radically changed life situations, no more remedy would be afforded. No alternative solution is capable of affording appropriate remedies to those already victimized. In the absence of exclusion other remedies may in fact prompt such evasive practices as taking the punishment in exchange for much desired convictions, suspending sentences or failing to find against the police. This communication is hardly conducive to teaching constitutional values.

Should the Court maintain its present posture with regard to exclusion, it will have doubly failed. Not only have recent decisions failed to provide an intelligible standard for police conduct, but they discriminate against accused persons by a standard related to deterrence which is unnecessarily obscure. We doubt that police officers, prosecutors and judges understand this communication. Certainly, private citizens who have the right to understand the extent of their protection from the actions of government, at present probably cannot.

Finally, if the Court correctly chooses to retain the practice of exclusion and to invariably enforce it, its meaning should be clear to all. Teaching correct social values requires time, consistency and exemplary behavior on the part of the teacher. The exclusionary rule is a good constitutional doctrine, but if the courts waiver in its defense and enforcement it has little chance of augmenting our liberties. Throughout our history, each expansion of rights and each step toward the ideal of democracy has been accompanied by alarm and the temptation to return to former ways. It has been largely due to the leadership and example of the Supreme Court that we enjoy our present high level of freedom.

Our founding fathers wisely created the judicial branch of government insulating it to a great extent from the demands of majoritarian politics. Although democracy requires that government be sensitive to the demands of the majority, an unrestrained majority is the most serious of threats to a political regime.[91] That the general public has little regard for democratic values and civil liberties except in a very abstract sense is well documented.[92] We must depend upon the Constitution and the courts along with other elites to carry the democratic creed.[93] They must temper the rule of the majority by protecting the rights of those whom the majority would abuse.

It is often in response to crises, whether real or imagined, that the majority becomes most abusive of its rule. The present "crisis" is a "wave of crime" which purportedly is the result of "coddling criminals" and "tying the hands of the police." Many of our citizens would now cease treating persons accused of crimes humanely, would suspend their rights and would deny them reasonable remedies for their abuse. This phenomenon is hardly new in our country. We have "suspended the rules" on numerous occasions in our desire to persecute witches, fornicators, communists, dissidents and members of racial and ethnic minorities.

It is shocking that we so easily forget such events and succumb to the temptation to give our rights away. More shocking is the circumstance that the traditional defenders of liberty—the educated, the politically active and the professions—are among those who would join with the majority in narrowing the scope of our liberty. Even more appalling is the fact that the legal profession and the Supreme Court of the United States should appear to be leaning in that direction, or indeed, leading the way! These trends portend an unfavorable future for a free America. If our political elites will not support the values upon which our Constitution was based we may lose many of our rights. Although in the context of our entire portfolio of protections against the arbitrary acts of government the exclusionary rule may seem minor, but then "[i]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."[94]

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[91] That this fact was recognized by the founding fathers is evidenced by Madison's remarks to this point in THE FEDERALIST No. 10 (J. Madison).

[92] *E.g.*, McClosky, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361 (1964); Prothro & Grigg, *Fundamental Principles of Democracy: Bases of Agreements and Disagreements*, 22 J. POL. 276 (1960).

[93] R. DAHL, WHO GOVERNS? (1961). In chapter 28, Dahl argues that among non-elites there exists only acceptance of democratic ideals and personal freedoms of others. Further, in DAHL, POLYARCHY, chap. 8 (1971), he assigns the role of supporters and teachers of these ideals to political activists and leaders. The role of forming public opinion is filled by political elites according to V. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY, chap. 21 (1961). The success of constitutional democracy then depends on the "carriers of the creed" whom these and other researchers identify as political elites.

CONCLUSION

Careful analysis of the exclusionary rule reveals that its primary intent has been to teach and enforce principles of constitutional democracy. Until very recently, the Supreme Court has justified the rule solely on that basis. Contemporary critics of the rule, including a majority of the Burger Court, have ignored its original intent and have focused pragmatically upon its deterrent effects. Our defense of the exclusionary rule has explored and answered this and other major objections to the rule.

American democracy is firmly based upon the notion of limited government. Suppression of illegally seized evidence is indispensible if government, as the instrument of majority rule, is to be restrained by the Constitution. Although other remedies for deterring illegal police behavior are possible, they must supplement rather than replace the exclusionary rule. To abandon the rule would result in loss of respect for constitutional values and would deny justice to the actual victims of unlawful official behavior.

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[94] Boyd v. United States, 116 U.S. 616, 635 (1886).

The exclusionary rule: have critics proven that it doesn't deter police?

by Bradley Canon

Editor's note: Since last August, Judicature has published three widely-read discussions on whether the courts should retain the exclusionary rule, which requires judges to suppress evidence that police obtained through an illegal search.

Professor Yale Kamisar initiated the debate last August ("Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?") and U.S. Circuit Judge Malcolm Wilkey gave his response in November ("The exclusionary rule: why suppress valid evidence?"). Both men made their closing arguments last month.

Now two social scientists will discuss a key question in the debate: does the rule really deter police from making illegal searches? Bradley Canon argues that the evidence is inconclusive; in some cities, the rule deters; in others, it doesn't. Steven Schlesinger responds that the rule's proponents bear the burden of proving that it is effective—and they have not provided such proof.

Judge Malcolm Wilkey attacks the exclusionary rule in search and seizure in terms of both logic and experience. I will leave the logical arguments to others; my purpose here is to evaluate his claims that experience proves that the rule is socially costly and that it fails to achieve its purpose of securing police compliance with the Fourth Amendment.

According to Wilkey a variety of crimes would be significantly curtailed if the rule did not exist: gambling, narcotics, prostitution, armed robbery and concealed weapons.[1] No evidence, however, is offered in support of this assertion. Indeed, it is hard to see even a logical connection between the rule and the incidence of some of the crimes. Armed robbery is certainly far more a product of a society whose public policy (the only one in the civilized world, I might add) allows almost unrestricted access to weap-

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[1] Malcolm Richard Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 JUDICATURE 215 (November 1978).

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ons rather than the legal inability of the police to search for guns in the few minutes before the crime occurs.

Moreover, the exclusionary rule in no way prevents the police from confiscating concealed weapons.[2] The real problem is not that criminals walk down [illegible] streets with bulging automatics in their coats or submachine guns thinly covered by blankets. The problem is that the weapons are well hidden and the police often do not know whom to search. Though reading Dick Tracy may suggest otherwise, criminals do not come in malformed, misshapen sizes rendering them easily identifiable to the police. Getting rid of the exclusionary rule would not alter the situation very much (unless, of course, the police adopted a policy of searching *everyone* randomly—in which case we would truly be living in a police state).

The impact of Mapp

Indeed, taking Wilkey's argument to its logical conclusion, one would have to believe that we lived in a rather crime-free society before *Mapp* v. *Ohio* in 1961.[3] This of course is hardly the case. It was in the 1920's and 1930's, not the 1970's that Dillinger, Capone and other gangsters walked the streets carrying violin cases. It was in the 1950's, not the 1970's, when organized crime's involvement in gambling became so notorious that the Kefauver Committee made headlines for months investigating it. I argue not that there is less crime today than there was before *Mapp*, but Judge Wilkey's assertion that the incidence of crime is *related to* the exclusionary rule fails to withstand even the most modest scrutiny.

In this vein, in fact, I find it amazing that Wilkey imputes to criminals a detailed knowledge of the law of search and seizure. ("Criminals," he writes, "know the difficulties of the police in making a valid search which will stand up under challenge at trial."[4] No evidence is offered that criminals are so learned in the law and it seems quite anomalous to assume so, considering that search and seizure law is so confusing or uncertain that the nation's most prominent jurists and legal scholars have described it as a "quagmire,"[5] a "no man's land"[6] and a "course of true law [that] has not run smooth."[7]

Ironically, Chief Justice Burger, a staunch opponent of the exclusionary rule, argues that one of its disadvantages is that *policemen* do not understand the intricacies of search and seizure law and thus often make mistakes in search situations.[8] He may well be right on this point, but if so Judge Wilkey's imputation seems all the more surprising. It takes more credulity than I have to believe that the basic problem is one of "smart crooks" and "dumb cops."

A differential impact

My main concern with Judge Wilkey's article, however, is not a fear that readers will be taken in by his exaggerated or unsound claims about the responsibility of the exclusionary rule for the high incidence of crime nowadays. Most readers, I am confident, have sufficient judgment to discount such claims. My concern, rather, is that they will accept the judge's assertion that empirical studies demonstrate that the rule is ineffective in deterring police violations of the Fourth Amendment. After all, they might reason, Wilkey is not reporting his own observations or conclusions here, but is merely citing studies carried out by others.

The problem is that Judge Wilkey's treatment of these studies leaves much to be desired. It seems that he relies in large part on the summaries of these studies and conclusions drawn from them by Professor Steven Schlesinger in his recent monograph on the rule.[9] Schlesinger is quite open in his hostility to the exclusionary rule and, unfortunately, this has led him to misinterpret some studies and downplay others. Moreover, additional evidence has become available after Schlesinger's work was published.

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[2] Judge Wilkey fails to recognize this point in his discussion of the exclusionary rule and gun control, *id.*, at 224-225.

[3] 367 U.S. 643 (1961).

[4] Wilkey, *supra* n. 1, at 224.

[5] LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. LAW BULL. 9 (1972).

[6] Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474 (1961).

[7] Frankfurter, J., concurring in Chapman v. U.S., 365 U.S. 610, 618 (1961).

[8] Dissenting in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, at 417 (1976).

[9] Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE. New York: Dekker, 1977.

When the totality of the evidence is examined more fully and more dispassionately, it does not support the Wilkey-Schlesinger conclusion that the rule is inefficacious in curbing illegal police searches. Neither, I should make it clear, does the evidence support the opposite conclusion—that the rule deters police illegalities nearly 100 per cent of the time. Put shortly, the rule has a differential impact depending upon time and place.

Replicating the Oak's study

Let us take a hard look at the empirical evidence. Wilkey argues that Dallin Oaks' study[10] is the "most comprehensive study ever undertaken"[11] on the subject. But Oaks' own research is devoted chiefly to drawing inferences about police behavior in Cincinnati from arrest records in search and seizure type crimes (largely gambling, narcotics, and weapons offenses) in the five or six years before and after *Mapp*.[12] It is a careful study and there is little doubt that the rule had only minimal impact on police behavior in Cincinnati immediately following *Mapp*. But it can hardly be considered comprehensive.

Few would be so bold as to join Judge Wilkey in claiming that police behavior in one city 15 years ago is representative of police behavior throughout the United States in 1978. Oaks himself freely admits that his study "obviously falls short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."[13] Indeed, Wilkey puts words in Oaks' mouth when he tells us that "Oaks concluded" that the exclusionary rule is a failure;[14] Oaks took pains to note that this assertion "is an argument, not a conclusion."[15]

Working on a Ford Foundation grant in 1972-73, I replicated Oaks' Cincinnati study for 19 other American cities.[16] Statistical techniques were used to eliminate arbitrary judgments and control for alternate explanations. In nine of the cities, there was a statistically significant decrease in arrests in all or most search and seizure crimes following *Mapp*, while in the other 10 the impact was minimal or absent.[17]

Seemingly the exclusionary rule can and does have a very real, although hardly universal deterrent, effect on the police. The rule's impact, I concluded, depended much on such factors as degree of professional training prevailing in a department, policies of chiefs of police and squad commanders, the attitudes of mayors, city councils and other officials, etc. There simply was no singular response (or non-response) pattern to the exclusionary rule in the five or six years after *Mapp*.

Other studies

Schlesinger also briefly discusses Michael Ban's study of the use of search warrants in Cincinnati and Boston[18] and the Columbia Law School study of narcotics arrests in Manhattan following *Mapp*.[19] Ban found the annual use of search warrants rose from virtually zero to over 100 in Cincinnati while in Boston it went from about 100 to nearly 1,000.[20] He argued the Cincinnati figures are too low to represent wholehearted compliance with the Fourth Amendment—a conclusion that dovetails well with Oaks' Cincinnati findings. On the other hand, Ban concedes the Boston figures imply considerable if begrudging police compliance.

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[10] Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

[11] Wilkey, *supra* n. 1, at 222.

[12] Oaks also collected data on the frequency of motions to suppress evidence in Chicago and Washington. The former data were used by Spiotto, *infra* n. 35, and will be discussed at some length later. The Washington data offer no support for a claim that the police continued to violate the Fourth Amendment after *Mapp*.

[13] Oaks, *supra* n. 10, at 709.

[14] Wilkey, *supra* n. 1, at 222.

[15] Oaks, *supra* n. 10, at 755.

[16] The results are reported in Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977). A preliminary and less methodologically oriented report is found in Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against A Preciptious Conclusion*, 62 KY.L.J. 681 (1974). I rely on the former in the above discussion as it is more rigorous and corrects some errors appearing in the earlier article.

[17] Canon, *Testing the Effectiveness . . .*, *supra* n. 16, at 72, Table 2.

[18] Ban, "The Impact of Mapp v. Ohio on Police Behavior" (paper delivered at Midwest Political Science Association, May, 1973).

[19] Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COL. J.L. & SOC. PROBS. 87 (1968); Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhatten Police Practices*, 1960-62, 4 CRIM. L. BULL. 549 (1968).

The Columbia study noted a dramatic decline in narcotics arrests in premises but only a slight decline of street arrests. The authors conclude that *Mapp* inhibited police from illegal invasion of homes, etc., but not from street searches. They also speculate that this was partly due to the vice squad's (which conducts raids on premises) greater awareness of the decision and its implications. Again, these studies demonstrate the differential impact of the exclusionary rule; they hardly lend support to Judge Wilkey's claims that the empirical evidence shows the rule to be a "total failure in its primary task of deterring illegal police activity."[21]

The data involved in the above studies have one common feature: they come from the period immediately following the *Mapp* decision. However, in evaluating the exclusionary rule with an eye toward a public policy decision of retention, modification or abrogation, we must be interested in its present rather than its past impact on police behavior. Unless we can be reasonably sure that the impact reported in the early 1960's persists without great change into the present, the value of the above studies is quite limited. And while the data are thin and inferences tenuous, there is some reason to believe that the rule has become more effective than it was in the early 1960's.

A recent survey

In 1973 I sent questionnaires to police departments, prosecutors and public defenders in all American cities with populations of more than 100,000.[22] I asked whether their current search and seizure practices differed from those prevalent in 1967 and, if so, how. Responses came from over half the cities and clearly indicated that in most of them police compliance with the Fourth Amendment increased significantly over the six year period.

- Four-fifths of them reported the use of search warrants was more than 50 per cent greater than the 1967 level and 35 per cent of the cities reported an increase of more than 100 per cent.[23]
- Nearly two-thirds of the departments reported more restrictive policies pertaining to searches accompanying an arrest than they espoused six years earlier;[24] 18 per cent reported a stricter policy regarding searches of automobiles.[25]
- Moreover, while comparison with 1967 figures showed only modest change, 50 per cent of the cities reported that motions to suppress evidence were granted less than 10 per cent of the time[26] and in 63 per cent it was reported that charges were "rarely" dropped because of illegal seizure of the evidence.[27]

Even in the absence of the above data, one could reasonably surmise on the basis of impact patterns reported for other Supreme Court criminal justice decisions that the exclusionary rule is more effective now than it was in the immediate post-*Mapp* years. The controversial *Miranda* decision,[28] for instance, received only spotty compliance by police departments in the two or three years after its promulgation.[29] More recently, however, it seems to be effective in controlling police behavior—and even has won the approval of many officers.[30] And immediately following *In re Gault*[31] compliance was a hit and miss affair; many juvenile judges did not seem to know that such a decision had even been made.[32] Again, a decade's time has permitted the word to circulate and eroded resistance.[33]

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[20] Ban, *supra* n. 18, at 7, Table 1.

[21] Wilkey, *supra* n. 1, at 222.

[22] The results are reported in Canon, *Is the Exclusionary Rule . . .*, *supra* n. 16.

[23] *Id.*, at 712, Table 6.

[24] *Id.*, at 715, Table 8.

[25] *Id.*, at 719, Table 9.

[26] *Id.*, at 722, Table 10.

[27] *Id.*, at 724, Table 11.

[28] Miranda v. Arizona, 384 U.S. 426 (1966).

[29] Wald, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967), Medalie, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).

[30] Wasby, SMALL TOWN POLICE AND THE SUPREME COURT. Lexington, Massachusetts: D.C. Heath, 1976, *passim*; Cimino, *Confessions and Right to Counsel: The Impact of Miranda in Missouri*, 17 ST. LOUIS U. L.J. 579 (1973).

[31] 387 U.S. 1 (1967).

Experience tells us that sudden and dramatic changes in policy such as occurred with the *Mapp* decision do not produce alteration in behavior overnight. Information about Supreme Court decisions is particularly poorly disseminated, often easily misunderstood and sometimes ignored in deference to habit or convenience.[34] But eventually the word is spread; young, professionally trained recruits infuse the ranks; old-timers become a vanishing breed. It is not certain, of course, that police search and seizure behavior has followed this scenario, but it is certainly a plausible hypothesis.

Spiotto's study

The only other empirical evidence Judge Wilkey discusses is James Spiotto's study comparing results of a study of motions to suppress in search and seizure crimes in the Chicago Municipal Court in 1950 with those in 1969 and 1971.[35] Wilkey makes much of the findings and quotes Spiotto as follows:

> over a twenty year period in Chicago, the proportional number of motions to suppress evidence [in narcotics and weapons cases] allegedly obtained illegally increased significantly. This is the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct.[36]

This is an amazing conclusion. Spiotto is utterly unaware that Illinois adopted the exclusionary rule in 1924[37]—some 37 years before *Mapp.* (Besides being a legal researcher, Spiotto is an Illinois resident, so it is not easy to explain this monumental error.)[38] Thus the court was governed by the rule in 1951 as well as in 1969 and 1971 and the *Mapp* decision would have no legal impact on its receptivity to motions to suppress.

It could be argued—although it is not a point made by either Spiotto or Wilkey—that *Mapp* had an impact even in those states which had previously adopted the rule because federal civil liberties decisions have a greater visibility than those made by states or because police officers have reason to believe that state judges do not take such decisions seriously while federal judges do. This may be true in some jurisdictions,[39] but it is obviously not the case in Chicago. Its court was clearly enforcing the exclusionary rule prior to *Mapp*; the 1950 study shows that 98 per cent of all motions to suppress were granted.[40]

Even if Illinois had not adopted the rule long before *Mapp*, Spiotto's conclusion about the rule's inefficacy would be flawed. After all, if there were no exclusionary rule, there would be no point in defendants moving to suppress evidence (such motions would obviously be denied) and consequently there would be few such motions filed and none granted. Thus it would be perfectly natural that the porportion of such motions granted would rise dramatically after the *Mapp* decision when judges would be constitutionally obligated to consider them seriously and grant those with merit. The "significant increase" Spiotto reports would tell us nothing about the impact of the rule on police conduct; it would speak only of the perfectly obvious impact of the rule on the conduct of *defense attorneys*.[41]

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[32] Lefstein, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 L. & SOC. REV. 491 (1969); Canon and Kolson, *Rural Compliance With Gault: Kentucky, A Case Study*, 10 J. FAMILY L. 300 (1971).

[33] In the spring of 1975, my graduate seminar at the University of Kentucky replicated the study reported in Canon and Kolson, *supra* n. 32. The results clearly demonstrated a much higher knowledge of and compliance with Gault by the state's juvenile judges than was the case in 1969.

[34] Dolbeare and Hammond, THE SCHOOL PRAYER DECISION: FROM COURT POLICY TO LOCAL PRACTICE. Chicago: University of Chicago Press, 1971; Wasby, *The Communication of the Supreme Court's Criminal Procedures Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1083 (1973).

[35] The data is reported in Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatices*, 2 J. LEG. STUDIES 243 (1973); Spiotto also discussed it in *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & ADMIN. 36 (1973). The 1950 study is reported in Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. L. REV. 493 (1952). The 1969 data is discussed in Oaks, *supra* n. 10.

[36] *The Search and Seizure Problem . . .*, *supra* n. 35, at 37 (cited by Wilkey, *supra* n. 1, at 222-223).

[37] People v. Castree, 143 N.E. 112 (1924).

[38] It is not absolutely clear from the above quotation that Spiotto is unaware of Illinois' earlier adoption of the rule. However, at another point, Spiotto makes his ignorance on the point quite plain. *See*, *Search and Seizure: An Empirical Study . . .*, *supra* n. 35, at 276, where he says, "As pointed out earlier in this study, during the period 1950-1970, *in the course of which the exclusionary rule was introduced in Illinois*, . . ." (emphasis added).

[39] I explore this hypothesis in Canon, *Testing the Effectiveness . . .*, *supra* n. 16. The aggregate evidence lends it some support.

[40] Spiotto, *Search and Seizure: An Emprical Study . . .*, *supra* n. 35, at 247, Table 1.

Finally, it might be argued that regardless of when the exclusionary rule was adopted, the percentage of motions to suppress is much too high—running 69 per cent in 1950 and in the 30 per cent to 35 per cent range in the 1969-71 period[42]—and that this in itself is damning evidence of the rule's ineffectiveness. Chicago, however, is not a very typical city in this respect. As previously noted, in three-fifths of large American cities, 10 per cent or fewer of such motions are granted and in only a handful were over 25 per cent of such motions granted.[43] Indeed, Chicago police are reputed to enforce the vice laws in a manner which insures that motions to suppress will be successful.[44] Thus they have their cake and eat it too by appearing to engage in vigorous enforcement activity and yet refraining from seriously endangering the continued existence of organized vice.

Existing data make it impossible to establish a universal conclusion—either "yes, it works" or "no, it doesn't work."

Conclusion

In summary, Spiotto's study of motions to suppress sheds no light at all on the efficacy of the exclusionary rule. It is highly unfortunate that both Professor Schlesinger and Judge Wilkey place so much reliance on it. The endorsement of the badly flawed study by persons in such positions lends it undeserving credibility among readers unfamiliar with the subject. That Wilkey and Schlesinger rely on Spiotto's so-called conclusions so eagerly is (especially in Schlesinger's case, as he is a social scientist presumably experienced in the analysis of data) yet another attestation to the ever present human tendency to grasp at any straw in order to promote values and beliefs already adopted.

None of the above is meant to suggest that the exclusionary rule is or inevitably will be largely effective in securing police compliance with the Fourth Amendment. What it is, simply, is a refutation of repeated assertions and implications that the rule is ineffective in deterring police misconduct. Existing data at the present time make it impossible to establish empirically a universal "yes, it works" or a "no, it doesn't work" conclusion—or even anything approximating such a conclusion.

Judge Wilkey, Professor Schlesinger and others have every right to disagree with the exclusionary rule; certainly there are reasoned arguments which can be advanced against it independent of an empirical one. But what they do not have a right to do is to disseminate a myth that empirical studies show that the issue has been resolved negatively. To the degree that empirical studies of its impact bear on the decision to retain, modify or abandon the rule, the public—and the decision-makers—are entitled to facts, not myths. ☐

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See the following article for an opposing view.

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[41] Oaks agrees with this point, *supra* n. 10, at 713-14.

[42] Spiotto, *Search and Seizure: An Empirical Study . . .*, *supra* n. 35, at 247, Table 1.

[43] Canon, *Is the Exclusionary Rule . . .*, *supra* n. 16, at 722, Table 10. See the discussion surrounding n. 26, *supra*.

[44] *See* Comment, *supra* n. 35, and LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. Rev. 391, at 423 (1965).

The exclusionary rule: have proponents proven that it is a deterrent to police?

by Steven R. Schlesinger

One of the many issues that students of the exclusionary rule debate is whether the rule deters police from conducting illegal searches and seizures. Professor Bradley Canon has discussed some of the empirical evidence on that issue in the preceding article. And perhaps he has achieved his very modest goal—to show that, in some situations, studies have not completely disproved the rule's effectiveness in deterring police conduct.

His findings, however, cannot possibly be interpreted as a justification for continuing the rule, if we view the evidence in proper perspective. One must keep in mind, first and foremost, that the burden is on proponents of the exclusionary rule to show that it *is* an effective deterrent. Some 18 years after *Mapp* v. *Ohio*,[1] the available evidence does not even come close to satisfying that requirement.

Why is the burden on the proponents of the rule? First, whatever the original justification for the rule set forth in *Boyd* v. *United States*[2] and *Weeks* v. *United States*,[3] it is clear that the current Supreme Court considers deterrence to be the primary justification for the rule.[4] If, therefore, the rule is not an effective deterrent, then it is appropriate for the Court to reconsider its position.

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[1] 367 U.S. 643 (1961).
[2] 116 U.S. 616 (1886).
[3] 232 U.S. 383 (1914).

Second, it is clear—and the proponents of the rule to some extent concede—that the rule has many costs and disadvantages not related to deterrence. Judge Malcolm Wilkey has discussed some of these costs, but we would do well to list them again:

- the rule releases many otherwise guilty persons, some of whom are dangerous or violent;[5]
- it diminishes public respect for the legal and judicial system;[6]
- it fails to distinguish between more and less serious crimes[7] or between willful, flagrant violations by an officer and "good-faith" errors committed in difficult circumstances;[8]
- it excludes the most credible kinds of evidence;[9]
- it intensifies plea bargaining, since a questionable search may well be one of the bargaining points between prosecution and defense;[10] and
- the rule tends to push the judiciary toward dangerously expanded notions of what is a legal search in order to admit evidence which judges are reluctant to suppress.[11]

The possibility of deterrence, therefore, must be weighed against these costs. Since the proponents of the rule offer deterrence as a justification for it, the burden is on them to show that the advantages of deterrence outweigh these heavy social costs.

The empirical evidence

In the preceding article, Professor Canon describes as a "myth" the claim that empirical studies have shown that the rule is an ineffective deterrent. In fact, the empirical studies, while not conclusive, indicate just that.

In my book, to which Canon repeatedly refers, I reported primarily on the empirical studies of Dallin Oaks, Michael Ban, James Spiotto, and Professor Canon.[12] Let us review briefly the findings from each of those studies.

Oaks' 1970 study of law enforcement in Cincinnati between 1956 and 1967 convinced him that:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelm-

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[4] As the Court said in Stone v. Powell, 428 U.S. 465, 486 (1976): "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights."

[5] Oaks' study of motions to suppress in gambling, narcotics and weapons cases in Chicago indicates that "in every single one of these cases in which a motion to suppress was granted, the charges were then dismissed." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 746 (1970).

[6] *See* Stone v. Powell, *supra* n. 4, at 490-91.

[7] As to applying the exclusionary rule only in the most serious cases, *see* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046-49 (1974).

[8] Both Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L. J. 573, 577-78 (1971) and *Student Comment: The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. OF CRIM. L., C. AND P.S. 256, 258-59 (1972) note that the rule fails in any way to take account of the seriousness of the violations committed by the police officer.

See also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 418-19 (Burger, C.J., dissenting) (1971) and Kamisar, *Wolf and Lustig, Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1146-47 (1959).

[9] *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 JUDICATURE 215, 223 (1978).

[10] *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 56, 80-2 (1968).

[11] As to the effect of the rule on other, often related, legal matters, Mr. Justice White has recently observed: "If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases." Rakas v. Illinois, 47 U.S.L.W. 4025, 4033 (1978).

For a discussion of the disadvantages of the exclusionary rule not related to deterrence, *see* Steven R. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 60-63 (1977).

[12] Schlesinger, *supra* n. 11; Oaks, *supra* n. 5; Ban, "The Impact of Mapp v. Ohio on Police Behavior" (delivered at the annual meeting of the Midwest Political Science Association, Chicago, May, 1973); and "Local Courts v. The Supreme Court: The Impact of Mapp v. Ohio" (delivered at the annual meeting of the American Political Science Association, New Orleans, September, 1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY L. J. 681 (1973-74).

ing majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement directed at prosecution.[13]

Ban's two studies of the impact of the rule in Boston and Cincinnati, conducted in the mid-1960's, also tend to confirm the ineffectiveness of the rule.[14] Ban concludes that the rule showed spotty effectiveness in Boston and almost none in Cincinnati.

Spiotto's study of motions to suppress in Chicago between 1950 and 1971 convinced him that "the deterrent rationale for the rule does not seem to be justified" and that "given the present status of the law and the workings of the exclusionary rule, change is warranted. . . ."[15] Contrary to Professor Canon's claim, I never endorsed Spiotto's work completely.[16]

Canon's findings indicate the rule may have had some impact, but they hardly make a case for a substantial deterrent effect.

While Spiotto's research contains real weaknesses, including a faulty research methodology, his study nonetheless tends to show that in Chicago police misbehavior did not decrease over a 21 year period (1950-1971) during which Illinois had a self-imposed exclusionary rule. Likewise, it did not decrease in the 10 years after the rule was imposed on all the states by the United States Supreme Court. Thus, while Spiotto's research decidedly does not answer the question about how much more police illegality there would be without the rule, Chicago's experience lends little credence to Canon's thesis that the rule deters over time.

Professor Canon has previously admitted that it would be fair to treat these studies of Cincinnati, Boston and Chicago, as well as studies of Washington, D.C. and New York, as an indictment of the rule, if not a conviction.[17] But he now maintains that two of his studies, published in 1974 and 1977, support the notion that the rule deters.

Canon's studies

His 1974 study attempts to update (to 1973) evidence on the rule's deterrent effect.[18] However, it suffers from so many methodological flaws and other difficulties that its findings are not very useful. In fact, Canon now admits that "some errors" appear in the newer article. For example, much of his study was based on questionnaires which he mailed to police, prosecutors, and public defenders in American cities with populations of more than 100,000. But he received returns on only 47.4 per cent of the questionnaires sent to the police, 35.2 per cent of those sent to prosecutors and 40.2 per cent of those sent to public defenders.[19] Thus, the nature and size of his sample simply do not permit valid generalization; it was neither random nor representative. Those cities whose search and seizure practices were least in conformity with current law—those whose practices would have negated Canon's thesis about the effectiveness of the rule—would have been the ones least likely to respond to a mailed questionnaire; they would hardly have been anxious to acknowledge or to announce their own failure to obey the law.

Professor Canon nowhere stated which officials filled out the questionnaires. And, generally speaking, there is simply no way of knowing whether the questionnaires were answered truthfully. Anyone trying to give the police a favorable image might have been less than candid in reporting about police compliance with proper search and seizure procedures.

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[13] Oaks, *supra* n. 6, at 755.

[14] Ban, *supra* n. 12.

[15] Spiotto, *supra* n. 12.

[16] Schlesinger, *supra* n. 11, at 64-65, n. 9.

[17] Canon, *supra* n. 12, at 699.

[18] *Id.*

[19] *Id.*, at 702, n. 81.

Other difficulties

In addition to the general methodological difficulties in this study, it is important to examine the research methods that Professor Canon used on three of his major topics: numbers of search warrants issued,[20] changes in police search and seizure policies,[21] and successful motions to suppress evidence.[22]

Canon asked both police and prosecutors to estimate the number of search warrants issued annually in their respective cities. He then compared these estimates for the early 1970s with what he admitted were very thin data concerning the number of search warrants issued in the 1950s and 1960s. He concluded, not surprisingly, that there was an increase in the number issued.

Yet the crucial question is *why* there was such an increase; Canon's own findings on causality seriously undercut his argument for the rule's deterrent effect. The respondents said that 55 per cent of the increase could be attributed to an upsurge in narcotics crimes, 24 per cent to judicial rulings (all judicial rulings on search and seizure, not just those on the exclusionary rule), 22 per cent to more police and better training, and 4 per cent to other causes.[23] While these findings indicate that the exclusionary rule may have had some impact, they hardly make a case for a substantial deterrent effect.

Professor Canon asked the police in the 1974 questionnaire about the extent to which their search and seizure policies had changed since 1967-68 and, again not surprisingly, they reported that the rule had a substantial impact. Yet the problems with Canon's research strategy here are serious. As he admitted, statements of official "headquarters" policy may not conform to actual police practice in the field.[24] Further, Professor Canon conceded that "such statements were sometimes unduly generalized to conform with sparsely worded questionnaire alternatives."[25]

Professor Canon himself noted that "some policies could be misreported so that they would appear to be in conformity with the law."[26] In fact, for the police to have answered Canon's questions in a manner which conflicted with his thesis would have required them to admit that, as a matter of official policy, they broke the law. To put it mildly, the questions themselves contained strong inducements for the police to answer in a manner which confirmed Canon's thesis. Amazingly, some departments did openly admit to policies which seemed to conflict with rulings of the United States Supreme Court[27]—no splendid testimony to the effectiveness of the exclusionary rule.

Finally, Canon's 1974 study sought to cast doubt on Spiotto's research on successful motions to suppress in Chicago by showing that Chicago was atypical in that it had more successful motions to suppress than the average American city. Though Canon did demonstrate that in this respect Chicago was atypical, he ignored the fundamental question: what effect did imposition of the exclusionary rule have on successful motions to suppress in Chicago and other American cities? What we really need to know is whether the rule reduced police misbehavior, as we would see from evidence of a decrease over time in successful motions to suppress. Neither Spiotto nor Canon has answered this question.

Professor Canon now claims that his more recent study[28] corrects "some errors" in the first, and is more rigorous. In fact, his 1977 study represents one of the most damning pieces of evidence produced so far regarding the rule's ineffectiveness. In his later study, Canon replicated Oaks' 1970 Cincinnati study for 19 other American cities. Summarizing his findings, Canon said the data indicated that the rule "has not always or even *often* worked,"[29] "that *Mapp* had seemingly little or no impact on the majority of cases,"[30] and that the data "do not come close to supporting a claim that the rule wholly or *largely* works"[31] (emphasis supplied). If these are Canon's own conclusions about the deterrent effect of the rule, he is hardly in a position to criticize those who conclude that, according to the available empirical evidence, the rule is not an effective deterrent against police misbehavior.[32]

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[20] *Id.*, at 707-16.
[21] *Id.*, at 716-17.
[22] *Id.*, at 717-24.
[23] *Id.*, at 713.
[24] *Id.*, at 716.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. (1977).
[29] *Id.*, at 75.
[30] *Id.*

The burden of proof

It is crucial to return for a moment to the discussion of the burden of proof with which I began this essay. Certainly, Professor Canon has not even come close to satisfying the heavy burden of proving the rule's deterrent effectiveness. Such proof is clearly required when deterrence is the primary justification currently used by the Supreme Court for the rule, and when it entails so many serious costs and disadvantages.

Furthermore, criminal justice literature supplies many reasons for doubting the deterrent effectiveness of the rule. First, the operative scope of the rule is limited—only evidence presented at trial, a narrow stage in the criminal process, is excluded. Thus, the trial affects only a small proportion of police activity.[33] Given the extraordinary amount of plea bargaining in American courts today, the instances in which the rule can be invoked at trial are dramatically reduced.[34]

Second, the impact of the rule falls only indirectly on police—it does not discipline the errant officer; the brunt of the exclusionary rule's effect is actually borne by the prosecution, which generally has little or no power to punish police misconduct.[35] Third, officers whose illegal actions result in loss of convictions may receive the implicit or explicit approval of their superiors.[36] Fourth, trial judges do not often explain to officers why their evidence is excluded; the impact of the rule is limited if the police are not informed of the nature and effect of their wrongdoing.[37]

Fifth, loss of convictions through exclusion of evidence is not as serious a matter for police as might be thought, since police effectiveness usually is judged by the number of "collars" or arrests, not by the number of convictions. Sixth, in jurisdictions where prosecutors decline to prosecute cases with substantial search and seizure problems, there are relatively few instances in which the rule can be invoked.[38] Seventh, there are some strong indications that the rule even encourages certain forms of police misconduct.[39]

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[31] *Id.* Professor Canon attributes the weakness of these findings to the fact that only a few years elapsed between the *Mapp* decision and 1965, the date of the study; he theorizes that the impact of *Mapp* increased over time. No study in the ensuing 13 years, however, has reliably shown the exclusionary rule to have a deterrent effect.

[32] *See, e.g.*, Mr. Justice Powell's majority opinion in *Stone v. Powell* which cites Canon's contrary views but concludes that there is an "absence of supporting empirical evidence" for the proposition that the rule deters police misbehavior. *Id.* at 492. Canon's contrary view is cited in note 22.

[33] *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE TASK FORCE REPORT: THE POLICE, 91 (1967).

[34] *See* Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80, 95-6 (1969).

[35] Oaks, *supra* n. 5, at 726; and Wingo, supra n. 8, at 576, note that the real brunt of the rule falls on the prosecutor, not the police.

[36] Oaks, *supra* n. 5, at 727.

[37] *See* Lafave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965); *see also* Oaks, *supra* n. 5, at 730-31.

[38] Oaks, *supra* n. 5, at 688-89.

[39] One study dealing with this problem notes that the same police officers are involved repeatedly in illegally conducted gambling raids which could very easily have been carried out in a legal manner, for example, by obtaining arrest warrants. The study concludes that some gambling raids are intentionally conducted in violation of search and seizure rules ". . . to immunize the gamblers while at the same time satisfying the public that gamblers are being harrassed by police." Dash, *Cracks in the Foundation of Criminal Justice*, 4 ILL. L. REV. 385, 391-2 (1951).

Another study indicates that police allegations as to how evidence was obtained changed after the *Mapp* decision, although actual police practices did not change substantially. The data indicate that police officers often fabricate testimony to avoid the effects of *Mapp*-based motions to suppress illegally seized evidence. *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. AND SOC. PROB. 91-6 (1968).

Also, Oaks notes that the rule creates an incentive for lying by the police and, through interviews with police officials, he documents the most common types of situations in which police fabrication occurs. Oaks, *supra* n. 5, at 739-42.

For a general discussion of the reasons for doubting the deterrent effectiveness of the exclusionary rule, see Schlesinger, *supra* n. 11, at 56-60. A more careful reading of my book would have shown Professor Canon that I did not, as he implies, take the position that the rule totally fails to deter. In fact, I observed: "There can be no doubt that a certain number of illegal acts are deterred by the rule, for many law enforcement officials must be reluctant to gather evidence which will be of no value in court." *Id.* at 56.

Ending the rule's tyranny

Two major rationales for the exclusionary rule, other than deterrence, are that it protects both individual privacy and the integrity of the American judicial system. I have attempted elsewhere to show that both of these justifications are inadequate and unsatisfactory;[40] space does not permit me to address these matters further here.

If, as I have suggested, the rule lacks substantial justification, the most important practical problem is how to move away from the tyranny of the exclusionary rule as the only remedy for any and all police search and seizure misconduct. If the rule were simply abandoned without some substitute, the police might infer, in Chief Justice Burger's phrase, that "open season"[41] had been declared on all criminal suspects—that all constitutional restraints on search and seizure had been removed. I have suggested elsewhere that successful alternatives to the rule probably would involve a combination of: police discipline imposed by an independent review board to which cases of police misconduct would be reported by victims, the general public or judges; and an improved civil remedy for innocent victims of illegal searches and seizures.[42]

The Court should make clear that states which develop acceptable substitutes will no longer be saddled with the exclusionary rule.

What the Court should do is to make it clear that those states which develop acceptable substitutes will no longer be saddled with the exclusionary rule. For their part, state legislatures and Congress should enact alternative schemes along the lines I have suggested and test them in the courts through cases reviewing criminal convictions. The fundamental standard for judging the acceptability of such substitutes would be the promise they offer for accomplishing the two objectives of disciplining police officers who engage in improper searches and seizures and of compensating the innocent victims of police misconduct.

Judicial and legislative actions of this kind would have several substantial benefits. First, no jurisdiction could successfully avoid dealing with police misbehavior. Second, we would discover whether the states, whose public officials (especially the attorneys general) have vehemently criticized the rule for years, are willing to shoulder the burden of formulating and testing alternatives to the rule. Third, diversity of experience among the states and the federal government would provide some real evidence (not speculation) as to how the rule operates in comparison with its alternatives.

We should try such alternatives at the state and federal levels and use the resulting knowledge to guide future attempts at deterring police misconduct. Such efforts may move us closer to an effective law enforcement system and away from the irrational, capricious and sometimes downright dangerous results of the exclusionary rule. The prospect of state and federal alternatives to suppression of evidence renders the future uncertain, but such uncertainty seems to be the only way to move us away from the tyranny of the exclusionary rule. ☐

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[40] Schlesinger, *supra* n. 11, at 47-50, 86-87.

[41] Bivens v. Six Unknown Named Agents, *supra* n. 8, at 421 (Burger, C.J., dissenting).

[42] Schlesinger, *supra* n. 11, chapter 4.

A postscript on empirical studies and the exclusionary rule

by Bradley C. Canon

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Much of what Professor Schlesinger writes does not reply to me at all. Roughly half of his space is devoted to a brief summary of several non-empirical reasons for modifying or abrogating the exclusionary rule and to a sketchy presentation of an alternate mechanism. Insofar as the series of articles in Judicature goes, I have no quarrel with him over this aspect of his response. In fact, in closing my earlier piece, I acknowledged that some reasoned non-empirical arguments could be advanced against the rule (page 403).

But as Schlesinger himself noted, I set a more "modest goal" for my article. I wanted to refute Judge Wilkey's emphatic assertion that the empirical evidence available on the subject conclusively proved the ineffectiveness of the exclusionary rule in deterring police violations of the Fourth Amendment.[1] Given his status as a federal judge and the sweeping nature of his statements, I feared that readers unfamiliar with the empirical studies themselves would accept his assertions uncritically.

Schlesinger allows that I may well have achieved my goal of showing that the evidence does not demonstrate the rule's ineffectiveness, and then adds that my findings cannot be considered a justification for the rule's continuance. But I never argued that the evidence justified retaining the rule. In replying to Judge Wilkey, I was quite explicit in concluding that available evidence is inconclusive at this time and gives no real comfort to either side. My purpose was to counteract a myth that all the available evidence indicates that the rule has failed to work.

Editor's note: *Does the exclusionary rule deter police from making illegal searches? That question was a topic of discussion in Judicature last month as part of the Kamisar-Wilkey debate over the exclusionary rule (August 1978, November 1978, February 1979).*

Professor Bradley Canon said that studies so far have not been conclusive; in some cities, the rule appears to work, in other cities, it doesn't. In reply, Professor Steven Schlesinger argued that studies which support the rule's effectiveness contain far more weaknesses than those which question its deterrent value.

Here is the final exchange between the two authors.

While there is no disagreement that my first article achieved its goal, Schlesinger uses his discussion of my position as an opportunity to advance the proposition that the proponents of the exclusionary rule have the burden of proving that the rule is an effective deterrent to illegal police behavior. It is a somewhat surprising argument since it has been the rule's opponents—Oaks,[2] Chief Justice Burger,[3] and now Judge Wilkey—who have initiated the discussion of the empirical findings. Why do they do this if the burden of proof is on the other side?[4]

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[1] Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 *Judicature* 215 (1978).

[2] Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

[3] Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

The problems of research

In discussing my investigations into the rule's impact,[5] Schlesinger concludes that my findings are, "not very useful" (page 406). Many of his criticisms amount to little more than the stressing of problems and caveats I acknowledged when writing the articles. A point-by-point counter-discussion would be rather time consuming and repetitive of what I have already said in the articles about these problems. Let me instead offer a brief, general discussion about the nature of empirical research into the impact of the exclusionary rule.

Obviously the best way of obtaining data about the deterrent effect of the exclusionary rule is to observe large numbers of policemen surreptitiously as they perform their duties. But that's logistically and financially impossible (and perhaps ethically impermissible),[6] so social scientists use alternate methods. I have used two basic alternatives in gathering information on the rule's impact upon police behavior: (1) drawing inferences about their behavior from recorded data, such as arrest and search warrant records; and (2) asking law enforcement officials questions about their policies, observations and behavior.

Presumably, Schlesinger does not object to the first alternative; Oaks,[7] Ban,[8] and the Columbia study which he cites favorably[9] also use this method. However, he objects to the second alternative because he thinks my respondents were likely to have falsified their replies—especially the police who he believes are fearful of admitting violations of the Fourth Amendment.

Now perhaps a few did lie. And, on the other hand, perhaps one or two calculating respondents reported violative policies where none existed in order to create the erroneous impression that the rule is not working and thus augment its chances of abolition. But the point is that there is no real reason to believe that police lying is very extensive.

Social scientists frequently ask people questions (promising anonymity, as I did) about their private, embarrassing or even illegal behavior. Only in this manner can we study such phenomena as voting behavior, sexual behavior, drug use, and wife beating. No one seriously contends that such studies are not very useful. Are the police any different?

Researchers such as Skolnick[10] and Wasby[11] have had no difficulty in obtaining from them admissions of illegal acts or unconstitutional policies. Indeed, in the past the police were quite candid about their violations of the Fourth Amendment.[12] As the exclusionary rule pertains to the admissibility of evidence in court and contains no punitive sanction against those transgressing the Fourth Amendment, there is no reason for the police to be less candid now.

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[4] Because of the difficulties of conducting thorough-going empirical research into the rule's impact and the inconclusive nature of the present evidence, I suspect the "burden" will not be embraced by either side.

[5] Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitious Conclusion.* 62 KY. L. J. 681 (1974) and Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977).

[6] Moreover, even if such observation could be carried out, it would only inform us about the present day state of police behavior with regard to illegal searches. We would still lack comparative information about such behavior before 1961 when the Court imposed the rule on the states in Mapp v. Ohio, 367 U.S. 643. Of course, there is no way such information could be obtained now.

[7] Oaks, *supra* n. 2.

[8] Ban, "The Impact of Mapp v. Ohio on Police Behavior" (delivered at the Midwest Political Science Association meeting, Chicago, May, 1973) and "Local Courts v. The Supreme Court: The Impact of Mapp v. Ohio" (delivered at the meeting of the American Political Science Association, New Orleans, September 1973).

[9] In his book, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (New York: Dekker, Marcel, Inc., 1977), chap. 3, Schlesinger favorably cites Comment, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COL. J. L. & SOC. PROBS. 86 (1968) which draws inferences from recorded data.

[10] Jerome Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY. New York: Wiley, 1967.

[11] Stephen Wasby, SMALL TOWN POLICE AND THE SUPREME COURT. Lexington, Mass.: Lexington Books, 1976.

[12] Murphy, *The Problems of Compliance by Police Departments*, 44 TEX. L. REV. 939 (1966) and Kamisar, *On the Tactics of Police-Prosecutor Oriented Critics of the Court*, 49 CORNELL L. Q. 436, at 441-43 (1964).

A comprehensive picture

The object of my investigation was to obtain as comprehensive a picture of the impact of the exclusionary rule as my resources would permit. It would have been foolish to ignore the possibility of asking questions of the actual participants in the impact process for fear that a few would lie. The data were collected and reported with proper cautions. Standing alone, they are not as reliable as recorded data, but they do not stand alone. The questionnaire results show basically the same conclusion as the recorded data—that the exclusionary rule has a differential impact as a deterrent. The similarity of results enhances the questionnaire data's reliability.

Since it is so difficult to obtain quality information on the impact of the exclusionary rule,[13] researchers are necessarily going to have to accept data that is not as reliable as they would desire. Even the recorded data contain some reliability problems; inferences drawn from them are based upon assumptions whose accuracy is presumed but is not 100 per cent certain—for example, that a substantial proportion of narcotics arrests result from police search and seizure behavior. Moreover, even Oaks and Ban, whose research methods cause Schlesinger no problems, sometimes use data based upon interviews with law enforcement officials or judges.[14]

To conclude, Schlesinger may want to aruge that the problem of reliability of data makes studies of the rule's impact "not very useful." But if that is the case, why bring up the empirical question in the first place? If we are going to consider the evidence as a meaningful factor in determining the future of the exclusionary rule, we need to do so as thoroughly and as dispassionately as possible. ☐

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[13] Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 Nw. U.L. Rev. 740 (1975).

[14] Oaks, *supra* n. 2, at 706, 717, 739-41; Ban, *Local Courts . . .*, *supra* n. 8, *passim*.

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A reply to Professor Canon

by Steven R. Schlesinger

In large measure, Professor Canon's response to my article misstates or evades what I said. He claims, for example, not to understand why the exclusionary rule's proponents must bear the burden of proving its deterrent effectiveness. There are at least two reasons.

First, the Supreme Court has made clear, since 1965, that it regards deterrence of improper police behavior as the primary rationale for the rule. The leading cases on the exclusionary rule in search and seizure make this point explicitly.[1] If the proponents of the rule are unable to show that it is an effective deterrent, then it is time for the Court to reconsider its position.

Canon claims not to understand why Chief Justice Burger,[2] Judge Wilkey[3] and Professor Oaks[4] have initiated a discussion of the empirical findings if the burden of proof rests with the rule's proponents. Clearly, they have done so because the exclusionary rule rests on a proposition for which, as they and I have argued, there is very little empirical support. In short, Burger, Wilkey, Oaks and I believe that Supreme Court decisions should be rational and that irrational decisions should be overturned.

Second, proponents bear the burden of proving the rule's deterrent effectiveness because the exclusionary rule has many costs and disadvantages, some of which I mentioned in my previous article (pages 404-405). Contrary to Canon's claims, therefore, my discussion of non-empirical aspects of the rule is plainly responsive to him; it is the responsibility of the rule's proponents to show that the advantages of deterrence outweigh these heavy social costs.

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[1] *See* Linkletter v. U.S., 381 U.S. 618, 636-38 (1965); U.S. v. Calandra, 414 U.S. 338, 347 (1974); and Stone v. Powell, 428 U.S. 465, 486 (1976).

[2] Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 338, 416 (1971) (Burger, C.J., dissenting).

[3] Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 Judicature 215 (1978).

[4] Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

Canon distorts my position on the state of evidence when he says that "Schlesinger allows that I may well have achieved my goal of showing that the evidence does not demonstrate the rule's ineffectiveness." In fact, I said that "the empirical studies indicate [that the rule is an ineffective deterrent]" (page 405), although, "*in some situations*, studies have not *completely disproved* the rule's effectiveness in deterring police misconduct." (Page 404, emphasis supplied).

As I showed previously, all but one of the seven studies discussed by Canon and me—those of Oaks, Ban, Spiotto, Canon and the Columbia Journal of Law and Social Problems—conclude that the rule does not generally deter.[5] In fact, Canon himself concludes, in his most recent and methodologically sophisticated study, that "the rule has not always or even *often* worked" and that the data "do not come close to supporting a claim that the rule wholly or *largely* works."[6] (Emphasis supplied). Although his earlier study suggests that "many of the findings support a positive inference—that the rule goes far toward fulfilling its purpose,"it suffers from so many methodological and other flaws as to be less than useful.[7]

Canon discusses only one of my many criticisms of that 1974 study—and not the most important one. That study used questionnaires to elicit information from the police and others about their search and seizure practices. For the police to have answered Canon's questions in a manner which conflicted with his thesis that the rule deters would have required them to admit that they broke the law. I leave it to the reader to decide how candid the police would be in these circumstances.

By arguing that other researchers have used similar procedures, Canon does not demonstrate the strength of his own study but the weakness of the others. Furthermore, the studies he cites appear to have collected data *directly* from their subjects, whereas his own study depended on two tiers of police responding, each with its own incentive to color the facts.

Canon's response ignores major problems with his 1974 study: the nature and size of his sample (well under 50 per cent) do not permit valid generalization, since the sample was neither random nor representative. Those cities whose search and seizure practices were least in conformity with current law would have been the ones least likely to respond to a mailed questionnaire; they would hardly have been anxious to acknowledge or announce their failure to obey the law.

Canon also ignores a second important problem: responses to the questionnaire involving official headquarters policy "may not conform to actual police practice in the field."[8] That Canon conceded this defect in his 1974 study does not improve the reliability of his conclusions.

What, then, is the bottom line? It is that all of us live under the irrational tyranny of an inflexible rule which releases many dangerous and violent persons *and* which, as Professor Canon himself has admitted, does "not always or even often" have a deterrent effect on police. Perhaps it is fair to say that, as long as we allow the rule to continue, we deserve what we get. □

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[5] Oaks, *supra* n. 4; Ban, "The Impact of Mapp v. Ohio on Police Behavior" (delivered at the annual meeting of the Midwest Political Science Association, Chicago, May 1973); Ban, "Local Courts v. the Supreme Court: The Impact of *Mapp* v. *Ohio*" (delivered at the annual meeting of the American Political Science Association, New Orleans, 1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681 (1973-74); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Local Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977); and *Effect of Mapp v. Ohio on Police Search and Seizure Practice in Narcotics Cases*, 4 COLUMBIA J. L. & SOC. PROB. 87 (1968).

[6] Canon, *Testing . . .*, *supra* n. 5, at 75.

[7] Canon, *Is the Exclusionary Rule . . . ?*, *supra* n. 5, at 726.

[8] *Id.* at 716.

Out of the Shadows and Into the Files: Who Should Control Informants?

[Reproduced with the permission of Police Magazine and Criminal Justice Publications from Police Magazine, v. 3, Nov. 1980: 36–44]

by David Marc Kleinman

THE use of informers remains one of the most arcane and mysterious aspects of police work. The relationships between police and their informers are a favorite subject for books and movies, which are full of carefully arranged clandestine meetings in shadowy alleys and tenement corridors. The informers are portrayed as unsavory, unprincipled characters who would sell out their own mothers for a few dollars or a fix. They generally die young.

The media portrait, if one ignores the frequent shootouts and high-speed chases, is not far from the truth. In most police departments, detectives are still possessive and secretive about their informers. They maintain that informers — better known in police paperwork as "informants" and on the street as "snitches" — are often more important to cracking a case than all the wondrous new technology available in the crime lab. They also say that the only way to maintain an adequate network of informers is to protect their anonymity. No one should know who the informer is except the officer who "works" him, according to this theory.

But during the last ten years, police administrators have become increasingly nervous about the traditional informant system. A series of scandals in local police departments, state police agencies and the Federal Bureau of Investigation have led administrators to demand that supervisors at all levels be made aware whenever their officers develop new informants; that officers file regular reports on their contacts with informants; that supervisors and, in some cases, prosecutors are sure of the truth and value of information before any money is paid; that some sort of central file, either at the district or department level, be kept of all the informers being worked by the detectives.

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The debate over the use of informers comes down to this question: who should "own" them — the detectives or the department. Those who opt for departmental control of informants say:

- that too many officers have covered up corrupt activities by explaining that their contacts in the criminal underworld were informers;
- that informers are not sufficiently discouraged from committing crimes by officers anxious to get evidence against more important offenders;
- that if individual investigators "own" their informants, the department as a whole is denied information that an informant may be able to provide to other detectives working on other cases.

Administrators and detectives who defend the traditional system say: 1) that the stream of information from criminal informants will dry up if they know that departmental files are being kept on their activities; 2) that no matter how tough security procedures are to protect the names, those who are determined to silence informants will obtain their names through corrupt or incompetent police personnel.

The biggest push to establish administrative control over criminal informants has been in departments where there have been public charges that officers abused their relationships with informers, and in agencies dealing with organized crime and narcotics enforcement — that is, where such great sums of money may be involved that administrators are not willing to give their officers a free hand.

The agency that has been most often and most virulently attacked for alleged abuse of informers is the FBI, which despite a lot of controversy still maintains a network of almost 3,000 informants. In response, the agency has promulgated tight regulations that, at least in theory, leave agents little opportunity to develop private relationships with their informers. Those regulations will be given the force of law when Congress passes the FBI Charter, which incorporates existing regulations.

Denunciations of the FBI's use of informers began in the late sixties, when it was revealed that J. Edgar Hoover and his lieutenants had used them extensively, along with undercover agents, to infiltrate civil rights and other groups that Hoover saw as subversive. The informers, it was revealed, sometimes acted as *agents provocateurs* and were sometimes involved in serious crimes that were overlooked by the FBI in exchange for intelligence information. Just recently allegations were published that Gary Thomas Rowe, an FBI informer within the Ku Klux Klan during the sixties, committed numerous crimes, including one murder, that the FBI knew about but covered up. The murder charge was subsequently dropped. Allegations that FBI undercover agents and informers were used improperly for political purposes continued through the Nixon

A former FBI agent says that until recently any clerical worker could discover the identity of an informant.

Administration and Watergate.

There have also been several nonpolitical cases that have raised eyebrows. For instance, James "The Weasel" Fratianno, a confessed Mafia hit man, worked as an informer for the FBI from 1973 to 1975; he was paid $16,000 for his assistance. (This is a relatively large sum. Most informers are paid anywhere from $10 to $100 for each piece of solid information, or are kept on "retainers" of as little as $100 per month.) Fratianno, who is now in hiding under the federal witness-protection program, turned out to be one of the most useful informers the FBI ever "turned." He has testified against and helped gain the conviction of several Mafia chieftains in New York, California, Ohio and Nevada. Just recently he was brought out of hiding to testify for the FBI in a Los Angeles case.

Fratianno also, it is alleged, has continued in his chosen profession. In 1977, he was indicted for murder in Cleveland and California. He was also indicted in California in connection with pornography and gambling schemes. For these crimes, the FBI offered Frattiano a deal in which he would not be sentenced to more than five years in exchange for his testimony. In fact, he served only 21 months.

It is not just civil libertarians and politicians who have objected to the FBI's handling of its informants. The federal agency frequently has run-ins with local police on the subject. In what appeared to be a concerted protest, a group of state and local officials in Arizona went anonymously to the *Arizona Republic* last June to complain that the FBI was intervening too often in local prosecutions. Agents were demanding that local charges be dropped against suspects, or that prosecutors recommend short or probated sentences, on the ground that the suspects were FBI informers. The *Republic* also recounted several cases in 1973 and 1974 where FBI informers allegedly used their special status to perpertrate enormous swindles.

The "management" of informants became an FBI "program" in 1976, when Attorney General Edward Levi established a written set of guidelines. One principal focus of the guidelines is the control of criminal activity by informants. The guidelines stipulate that steps be taken to make sure "that the government does not itself become a violator of the law."

The guidelines have recently been revised to conform to the strictures contained in the FBI Charter. Jeff Jamar, chief of the Informant Unit in the bureau's Organized Crime Section, says that the additions are "not that much of a departure" and "that it's more of a fine-tuning that any change in policy."

The fine-tuning, says Oliver Revel, assistant director of the FBI's Criminal Investigation Division, is meant to redress "a perception that's been bandied about that informants are given *carte blanche* to go out and commit crimes. . . . [that they're] unguided missiles that can invoke their informant status to cover up their acts." The adjusted guidelines, says Revel, are meant to "insure the public and the Congress that this is not the case." They have been structured "to trigger a higher level of review" of alleged criminal conduct of informants not specifically sanctioned by the FBI. Such conduct can only be sanctioned when it is "necessary for the informant to be able to report on a higher level of criminal activity that is of interest to the government," says Revel.

The bureau is understandably touchy on this point. Its own Planning and Inspection Division recently conducted an internal audit on agent compliance with the guidelines over a 26-month period that ended in February 1979. The report noted that while the criminal informant program "is being handled in substantial compliance with all internal rules and regulations," the one major exception had been "the lack of a specific requirement [by field division management] to document in the informant's file the fact that the informant was instructed as required by the Attorney General Guidelines that in carrying out his assignments he shall not engage in specific activities."

According to one active FBI agent, the omission of this specific requirement is no accident. "That's usually kept pretty informal," he says. "There's a recognition that the informer's going to be more productive if you don't spell all the no-nos out to him, and don't take him to task unless you have to."

While many believe that this is to some extent true, Revel maintains that "if a person becomes an informant, he knows what can and cannot be sanctioned. He knows that the penalties for unsanctioned criminal conduct can be revealing his identity and prosecution. There certainly are acts that we will not tolerate, no matter how important the informant is — specifically, acts of violence and major felonies, regardless of how deeply the individual may be involved in a criminal hierarchy."

Revel admits that some latitude must be given "an individual who has penetrated the upper levels of organized crime, in order to maintain his cover and not be singled out as the informant." But generally, he says, informants will not abuse their relationship with the agency by committing unsanctioned crimes because the relationship is the key to the consideration in court or the money they seek.

A more important problem with the new FBI informant management system is that part of it involves the registration of all informants in each field office's records system. While the system is secure enough that outsiders or unauthorized agents cannot get at the information, it is possible to penetrate the system if an outsider can find a corrupt FBI employee.

This happened in the bureau's Cleveland office in 1978. Geraldine Rabinowitz, a clerical employee, and her husband, were convicted of accepting more than $15,000 in bribes from organized-crime figures to supply them with confidential information from FBI files. These files included the names of people believed to be informing against underworld figures. More than 60 pages of sensitive documents were later recovered. The Rabinowitzes were then themselves "turned" by the FBI. In exchange for immunity from prosecution and a change in identity, they testified against their bribers, who were also the defendants in the murder trial at which James Fratianno appeared as a protected prosecution witness in 1979.

A former FBI agent in an eastern office says that 18 months ago it was possible for even a clerical worker to go right into the informant files and retrieve not only confidential information but also an informant's security code. "Because everything was cross-indexed," the ex-agent says, "and all the cross-indices were wide open, all you needed was the code and you could go to the files and fish out the name." He adds that at the time "anybody could break the symbols that they gave to the informants. It was appalling."

Assistant Director Revel says that now the informant filing system has been revised "so that informant files in and of themselves will not reveal their identities." But he admits that in the past the names were not secure because of "a general laxity within the field offices. Informant files were locked up but access to them was not as carefully scrutinized and controlled [as it should have been]. We now feel that the likelihood of penetration of the files is substantially reduced."

One active FBI agent with more than ten years experience says that "informant files used to be kept on open shelves. If I were super-curious and also corrupt and wanted to find out information, I could come up with quite a lot. But now, if you go in there and are not the case agent, you've got to log it. There are more controls now. That's true."

The FBI's federal sister agency, the Drug Enforcement Administration (DEA), keeps central, computerized records of informants' names and status. The DEA has also had problems keeping its records secure. In 1978, special agent Paul Lambert, one of the agency's computer programmers, and retired agent George Girard were both convicted of stealing information from the DEA computer and selling it.

The DEA became suspicious of Girard after a private investigator named James Bond learned that confidential DEA files, including the names of informants, were being sold to Boston-area defense attorneys. Bond, after being promised protection and a new identity, went to work for the DEA. He succeeded in purchasing from Girard phony information that had been planted in DEA files. The leak was traced to Lambert, who was videotaped stealing information from DEA files. Lambert was passing the information on to Girard, who was selling it to the highest bidder.

Wide World Photos

Convicted swindler Melvin Weinberg proposed the "sting" operation that eventually became Abscam. He posed as a representative of an Arab sheik, and provided crucial testimony against two Congressmen who were convicted.

The possibility of such leaks is a persistent problem for the DEA, which, like most narcotics agencies, relies heavily on informants — in this case, a nationwide network of them. But because of the huge sums of money involved in DEA cases, and because of the necessity of making available to all agents information on national and international drug trafficking, a central informant file must be kept, DEA officials say.

Special Agent James Forget, who participated in the investigation of Girard and Lambert and testified against them, says that the DEA has taken steps to insure that this kind of security breach can never happen again. "The computer security practices are constantly being revised," he says, and suggests that agents seeking information from DEA computers must now establish their "need to know" before being allowed access. Asked about other procedures to protect informants' identities, Forget replied, "I'm not going to say any more."

Another agency that has attempted to exert administrative control over its informant system is the New York City Police Department. The department now has a central registry of informants in its Intelligence Division. Precinct supervisors are also kept better informed about detectives' relationships with informers than they used to be. The new system, like so many other reforms in New York, resulted from the Knapp Commission and related investigations that revealed pervasive corruption in the department. The most serious corruption was in the central and precinct-level narcotics units. Detectives in those units were accused of using narcotics and money confiscated in raids or police-run extortion schemes to directly pay informants for their help. They were also accused of maintaining relationships with criminals they identified as informants, but who were in fact paying the officers to protect criminal activities.

New York's central registry index is cross-referenced according to the precinct or unit of the detective who registers the informant and according to the informant's "area of expertise."

Lt. Donald Moss of the Intelligence Division says that the system has "enabled us to solve a lot of crimes. If I'm a homicide detective in Queens and I'm looking for a guy who knows something about automobile thefts in the South

Bronx, I now can call the Intelligence Division. The Intelligence Division says, 'Well, here's the names of 12 detectives who have informants who are supposed to know about that.' We put him in touch with the detective, not the informant. This system means that if I get a crime in one borough, it doesn't shut me out from getting information from another borough — so I can reach out for informants in the particular area that I need."

The Intelligence Division assigns a master code number to each informant, so that the informant's identity will be known only to the detective who registers him and possibly to that detective's commanding officer. But, says Moss, "you can register an informant completely clandestinely by coming directly to us." This satisfies department registration regulations while allowing an officer who distrusts, as Moss puts it, "the guys in the borough office, or his chief," to avoid them altogether. In such cases the Intelligence Division will also know the informant's identity. But department policy is that the division can make no use of the informant without working back through the registering detective. Thus, despite the central register, the accent is still on the personal control of the informant by the individual detective who recruited him.

While the NYPD brass is proud of its central informant registry, some critics are skeptical of its value. "I think if you ask somebody to maintain a central file," says Anthony Bouza, former commander of uniformed forces in the Bronx, "the chain gets so elongated that it becomes worthless. . . . If you attempt to centralize it, you vitiate it."

Bouza, who is now chief of police in Minneapolis, believes that centralization tends to minimize the faith of individual detectives in the system. He has harsh words for the NYPD's central informant control system. "I don't think it works there," he says. "I think it's bullshit. They probably have a tiny file that nobody uses. That's how it works. It's not a mystery."

Bouza speculated that under such a system, certain units would demand to keep their own files of informants, to which officers from other units would not have access, or that they would keep such files even without authorization. Though they were guarded on the subject, spokespersons for the NYPD admitted that the department's Organized Crime Control Bureau does maintain its own files. It was hinted that other units, more or less formally, did the same.

One former New York narcotics detective says that the central registry has never been taken seriously by the street officers. "When you register someone, they clam up right away," he says. "Maybe it shouldn't be that way, but that's what happens. They get intimidated by the system. The only time I'd register someone is if I had to pay him a lot of money. Otherwise I'd keep him to myself."

The New York officer's dedication to the traditional system of "working" informants is shared by most administrators and street officers across the country. They are convinced that the informant network in any city would collapse if the "personal" relationship between detective and informant was violated, or if the informant knew that his identity had been made known to higher police officials.

"The informants have needs too," says Deputy Chief Bernard Jablonsky of the Minneapolis Police Department, "and they dictate terms to police officers: I'm willing to give you this only if I am completely unidentified, and that means to anybody. Now, if you wish to keep that contact, what's better? Do you say to the informant: Yes, I will keep your identity privy only to myself and I will not share it with anyone else, so that in fact you do at least receive the information into the police department? Or is it better to say: Hey, I'm sorry, I have to share this with my commanding officer. Your name has to be written down some place. The informant deals in the real world, not this world of, Wouldn't it be nice if we could perfect that [informant-control] system? No way, because he knows that in most agencies, if [another officer] is really entertaining a desire for something, they're going to get it."

Jablonsky tends to believe that no informant-control system can work, in part because both the informant and the detective know that police department records are notoriously insecure. "Most police departments, within their own communities, are sieves," said Jablonsky. "It is a sieve. You can walk into any police department and it's a grapevine, assuming you're part of that member group. And most officers, even when they do talk, don't have all the information; not having all the information, they don't know the relative importance of what they're talking about." This, he said, will lead to information leaks. "You could have an informant wind up in some alley."

Jablonsky's attitudes are echoed in the Tucson (Ariz.) Police Department. Maj. Peter Ronstadt, chief of operations in Tucson, said: "I think that the only way that we can continue to get reliable confidential informants is if their anonymity is protected. And any registration, even by number, I think has a tendency to start compromising that reliability. It also allows other people [in the department] to have access to them and there again the possibility of their anonymity being compromised is I think increased. You have to deal on a one-to-one basis here. If a guy's a snitch, nobody fools with him."

"Do the informants therefore not belong to the department?" he was asked.

"That's correct," he replied. "They do not belong to the department."

"They belong to the individual officer?"

"In essence, yeah."

Higher officials do intervene in Tucson if the informant wants money for his information, or if he wants to "work off a beef" — provide information in exchange for deferral of prosecution. The rule on payment of informants, said Ronstadt, is that "basically, nobody gets paid until the information has proved of value."

If the prospective informant has been accused of or arrested for a crime, the Tucson police leave it to the prosecutor to make deals. "If some guy is working off a beef," said Ronstadt, "that has to be approved by the prosecutor's office before we fool with it. We don't make those kind of deals ourselves. Right up front, the officer or detective who's involved in that kind of thing, before he gets to first base, he has to have that blessed by the prosecutor."

Wide World Photos

In 1963, mobster Joseph Valachi detailed the inner workings of organized crime to a Senate subcommittee.

To advocates of informant control, administrators like Ronstadt are unnecessarily timid. Administrators "have every right to control [their] informant program," said Edwin Steir, director of the New Jersey Division of Criminal Justice, a statewide agency that, often in conjunction with the New Jersey State Police, investigates organized crime and labor racketeering in that state. "A lot of police administrators don't think that they have the right to intrude into this secret relationship that exists between the informant and the investigator," Steir said. "But if you're going to run an effective department and keep it honest, you have an obligation to do it.

"The idea that the identity of the informant should be known only to the policeman, that the policeman should be totally responsible for dealing with the informant, and accountable to no one in his dealings with him, is ridiculous. And unnecessary. Some of the most effective investigators I've ever met who have developed and maintained informants have been guys who have worked under very tight systems of control. The identity has been known to me, to the agency, they have had clearly defined standards to meet in dealing with the informant — reports that had to be filed and so forth — and it did not impair at all the effectiveness of the relationship. In fact, what it did was it helped communications between the informant and the agency itself through the investigator.

"I've seen informants — high level, significant informants who had a tremendous amount to risk — who have been registered, fingerprinted, photographed, and have had to sign a piece of paper every time they got a nickel from the agency. And it hasn't discouraged them."

The idea that the detective/ informant relationship is simply a personal and individual one is scoffed at by some administrators. "Working informants is obviously a developed skill" that can be taught to any detective and should be monitored by his superiors, said Steve Hellsely, director of the California Bureau of Narcotics Enforcement. "You're basically talking about people manipulation." To argue that informants cannot be transferred from one investigator to another, he adds, is "like saying that a manager

Officers who are on the take can cover up their failure to arrest by saying the criminal was an informant.

from Shell Oil can't go over to General Motors and manage. If you're managing an informant, which is what you're supposed to do to meet whatever your organizational goals are, then managing a snitch is managing a snitch, whether you're in Maine or Florida. The techniques are the same."

New Jersey's Steir believes that these principles hold true not just for agencies like his that deal with high-level organized crime, but for every police agency, large and small. First, he says, informant-control systems enhance an agency's efficiency. Second, he added, they reduce the possibility of corruption and assure that a consistent "standard" is followed when police are inclined to overlook a suspect's crimes in exchange for information.

It is the latter practice that is most relevant to the daily experience of most detectives and patrol officers. While most officers who deal with informants pride themselves on their ability to get information from them at a minimum cost, Steir and other advocates of administrative control say that even veteran detectives can be conned and manipulated by veteran informers, and that for this reason some input from supervisors is prudent.

The basic fact to remember, it is pointed out, is that most informers are not nice people. Lawrence Herrmann, a former assistant U.S. attorney, former prosecutor in Manhattan and now a defense attorney, observed: "Someone who gets caught for the first time — say a music producer who was selling cocaine to musicians — all he knows to give up to the police is maybe his own customers and his one source, who might have given him up in the first place. Very often your nicest people are the people who are least able to cooperate, because they know the least. So as a result law-enforcement agents end up making pacts with people who very often have been career criminals, apprehended or not apprehended."

"Informants are people who have conflicting interests in dealing with law enforcement,"said Steir. "They may be afraid. They may want something from you and want to give as little as possible to get it. Their loyalties may be conflicting. They may not like some of the people they're giving you information about, but they may like others and want to protect them. The informant is a complicated personality and the cop who deals with him has got to understand that personality and overcome whatever resistance there may be to participating in a carefully supervised informant program."

The most common problem for the detective is that he is sometimes too anxious to overlook an informant's crimes. James Parsons, superintendent of police in New Orleans and formerly chief in Birmingham, Ala., is candid on this point. His own robbery unit, he said, "is notorious for walking into situations where their informants are using drugs and everything's in the house, and they're not concerned about that. They don't make an arrest. They just look at it, and that's just another nail they have, that's just another break, another advantage.

In 1948, magazine editor Whittaker Chambers admitted that he had acted as a courier for the Russians. He accused State Department official Alger Hiss of providing secret documents to him.

Wide World Photos

"I was with homicide two weeks ago and we were looking for a murder suspect. We go in the house [where the suspect was said to be] and there's drugs there and the homicide man picks up the drug and looks at it and says, 'Well, you know, now I've got to know where he is.' And the person just told him and there was no arrest made for the drugs. I'm sitting there saying to myself, 'Hmmm,' but at that particular point in time the murderer who had killed people was worth more than the drugs."

Chief Parsons paused, then added: "You may have chiefs tell you that that never happens, but I'm telling you that it happens every day in this country a thousand times."

In fact, other chiefs also admit that it happens. "Naturally the problem all administrators occasionally have," says Insp. Charles Light of the Morals Division of the Washington (D.C.) Police Department, "is that the investigator may fall in love with the informant. Not physically or anything, but he thinks that that informant will keep him in good cases. He may identify with him to a certain extent and overlook his shortcomings."

Light cites the example of an investigator in his own police department several years ago who "would do his best to get cases dropped for one particular informant, a housebreaker, because of the good information he provided him. He had developed just a real liking for the man, even though the guy probably should have been in jail."

Ronstadt of Tucson, though he adheres to the belief that the detective should "own" the informant, admits that some detectives sometimes become a little too possessive. "Some years ago," he said, "there was a narcotics dick here in Tucson whose snitch was rounding up partners to commit crimes and the dick arranged always for the snitch to get away. So the snitch never got burned, but the detective was able to make a couple of good-looking cases. He got away with it about three times, and then it started to look bad. He's no longer with us, but prior to that time he had posted 20 years on the department and was known as one of the best narcotics cops we ever had."

A similar, but much more serious, breach of the ethics of dealing with informers is alleged to have happened in Prince Georges County, Md., in 1967. The details were only revealed last February after an investigation by the Maryland State Police. According to the state police probe, two Prince Georges County officers planned the robbery of several convenience stores and then induced their informants to recruit known criminals for the jobs. Two of the individuals recruited were subsequently shot dead by police officers who staked out the stores. The stake-out teams were dubbed "death squads" by the Washington press.

Police officials express regret that sometimes their officers misuse and overprotect their informants. But this generally is not enough to persuade them to abandon traditional practices. A much greater inducement is the possibility of corruption.

Parsons of New Orleans is equally frank on this point. "When I was a young rookie officer [in Birmingham]," he said, "a lot of corruption was covered up in the name of informants. There were a lot of illegal places and the officers got much more than information there, and there's no doubt about that." When gambling dens and houses of prostitution were allowed to continue operating, he said officers would explain their failure to act by saying, "We're getting information out of there."

The possibility of corruption makes it absolutely imperative not only that an officer's supervisors know about his relationship with his informants, but that the officer document that relationship, says New Jersey's Edwin Steir.

"I certainly have dealt with situations in which a police officer is carrying on a relationship with a high-level organized gambling operator and he [the officer] is providing him with information that will aid the gambling operator in conducting his own business. [The officer] may very well be out arresting the competition, which enhances business. Now in these situations you may suspect that there have been payments made. You may even be able to prove that there have been payments from gambler to cop, but the defense always is, He was my informant. He is giving me information."

Steir says his typical response to this statement is, "Where is the information?"

All such information must be written down in reports and memoranda and passed on to supervisors, Steir maintains. "If I can't be there when one of my people is dealing with an informant, I can set standards which if not met can be the subject of some disciplinary action. That is, if your standard requires that to maintain that relationship with a criminal that relationship has to be reported — meetings have to be recorded, memos have to be filed — it means that an investigator can't get away with rationalizing or justifying a relationship once he's caught by saying, Oh yes, he's my informant. The question then is, Where are the reports? Did you comply with standards?"

Biblical informant Judas Iscariot plants the fatal kiss.

The Bettmann Archive, Inc.

Several years ago Steir had an investigator who had a relationship with a high-level racketeer and said he could get information from him. "It was suspect," says Steir, "because I couldn't understand what form this relationship took. I told him to go ahead, but document it." A year later, the state police put the same racketeer under surveillance and photographs showed the racketeer and the investigator together. "We checked to see whether that meeting was documented," recalled Steir. "It wasn't. So I fired him. To me that relationship is so sensitive that the investigator absolutely must follow the prescribed procedures."

Steir admits that documentation alone is not the answer, since the investigator he fired "could have filed false reports." But, he says, "it does go a long way to help control that relationship." According to Steir, the key to administrative control is the registration of the informant with the department and strong directives from above stipulating that all transactions are subject to review.

Few law-enforcement administrators are as tough as Steir. Most have chosen a middle ground, permitting their detectives to maintain traditional relationships with informers, but making such relationships subject to administrative review.

In Dallas, for instance, Assistant Chief Jack Revill says that, in principle, "the informant belongs to the department. But in reality he belongs to the detective. This is true because you're dealing with the human element here. I'm talking about the officers, and they're very possessive of informants. . . ."

But a measure of administrative control is maintained. A master log is kept to record meetings with informants. Monthly production reports on information provided and cases made are filed. This not only protects the individual officers, says Revill, but "develops credibility for the informant." Individual files are kept in a safe in each unit commander's office and are said to include the informant's name, his associates, his motive for informing, and an assessment of his credibility, which usually entails verification by at least one other source.

Information gleaned from different informants is merged and made available to the entire department only informally. This is accomplished through the free flow of information that is the result of "unit commanders meeting frequently and the various investigators assigned to those units having daily contact with one another," says Revill.

In narcotics cases, Revill says that one rule is paramount. "I won't swap one dealer for two. I want more than two — and I want bigger dealers. We can get all the street dealers we need."

The Los Angeles County Sheriff Department's attitudes on informant management are more formal.

"Understand that when we talk about informants," says Deputy Sheriff Robert Edmonds, "they belong to the department. They do not belong to the individual investigator. And the department must get the approval of the higher-ups, the superiors in the organization, to proceed with any arrangement."

Edmonds notes, however, that administrative control generally "works back through the individual deputy to the informant. Informants and individual officers have a very personal relationship from the standpoint that most informants will not talk to other officers. They trust the officer they're dealing with."

Edmonds said that administrators "must know the specifics of any transaction between the officer and the informant," but added that reports are not filed on the occasion of every meeting or contact between informant and officer. "If an officer is going to provide money, that's all documented — time, date, location, everything," said Edmonds. "And the informant has to sign for money received."

In the San Jose (Calif.) Police Department, the general procedure, says Assistant Chief Robert Bradshaw, is to tape record an arrestee's account of the information or assistance he would be willing to provide. The tape then goes to the district attorney, who makes the ultimate decision as to whether the arrestee will be allowed to work off the charge, in which case the complaint will never be filed. "You try to get the guy turned before he's booked," says Bradshaw. "Once he's booked into the system and court dates are set up, he's going to be at jeopardy." Only the district attorney can decide in criminal matters whether to forgo prosecution.

Bradshaw says his department has a set of written guidelines for the management of informants, but admits that they are not all-inclusive. The discretion of the police officers remains a factor. "The only way we can control that," he says, "is administratively, which comes down to dispersal of confidential funds." While informants in San Jose do not have to sign for money they receive, only Assistant Chief Bradshaw and the chief himself may allocate funds to the deputy chief in charge of the Bureau of Investigation, who in turn must approve subsequent payments. These payments are then logged and require numbered vouchers subject to future audits.

Bradshaw's main concern, he says, is that "you always have the fear that the checks and balances normally in practice won't be as good as you'd hope they'd be. Now and then you may get a real bad turkey working off a beef who shouldn't be." But Bradshaw believes this to be more a reflection of the general understanding in the underworld, especially among drug addicts, that, "If I get caught, I can probably work it off," than leniency on the part of police departments and prosecutors. Criminal offenders, he suggests, understand the barter system all too well. They know how to hedge their bets by staying abreast of the criminal activities of their associates and competitors.

Some of Bradshaw's colleagues think that the possibility of manipulation of officers by informers makes it necessary that there be administrative control. But, given the pressure on officers to clear cases in any way they can as fast as they can, a belief in administrative control is difficult to put into practice.

"Criminal informants have to be registered and controlled by the administration," says Chief Bouza of Minneapolis. "They belong to the department and not to any individual officer."

He was asked whether that works out in practice.

"I doubt it," he said. "I don't think it works out very well, because it's a relationship that relies very heavily on the personal aspect."

Bouza collected his thoughts momentarily, then added, "What you're doing is talking about one of the great tensions in law enforcement, the tension between efficiency and legality."

The issue of control, said Bouza, has not yet been resolved, but it comes down to having "commanding officers who are willing to maintain the confidentiality of the process and the security of informants, but who insist on a rigorous documentation — that the officer is going to go through a tightly documented process.

"I think it's absolutely essential that any administrator be prepared to put whatever the informant's doing in writing, and if he's not willing to put it in writing, he shouldn't be doing it." ☐

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A LEGAL HOUSE OF CARDS

by Albert M. Rosenblatt and Julia Carlson Rosenblatt

NOW AND AGAIN it is heard that the American criminal has a monopoly on the United States Constitution. Day after day, the public sees the guilty set free through legal procedures which they do not understand, but which, they are told, have something to do with someone's constitutional rights having been violated.

At its basis, the Constitution is blind to differences between people. Its protections, including the Fourth Amendment's guarantee against unreasonable searches, apply alike to the young, the old, the poor, the rich, the honest, the wicked. But things have taken a curious turn. In order to see to it that the Fourth Amendment is honored, the United States Supreme Court has decreed that anyone caught with incriminating evidence is authorized (and, increasingly, expected) to cry out that the evidence not be used against him because he was unlawfully searched. The trial court must entertain the claim even though the claimant may be undeniably guilty. Evidence obtained unlawfully must be thrown out, and this is the essence of the exclusionary rule.

The doctrine was first promulgated in federal courts and then expanded by the Warren Court in 1961 to embrace every state and local criminal court in the land. It was heralded as the enlightened solution; it was repudiated in England; it is unique among the nations of the world. It does not work.

In a free society, the government owes its citizens freedom from crime as well as freedom from governmental intrusion. Both criminal activity and police power threaten individual liberty, and the balance between the two is delicate. It was thought that occasionally releasing a lawbreaker—a short-term injustice—would bring about the higher justice of balance between these opposing forces. It has not.

The exclusionary rule was born out of concern for citizens' right to privacy, according to the theory that an errant police officer is "punished" by being made to stand by, helplessly, and watch his catch thrown back into the sea. The rule forbids the use of any evidence obtained by police who violate constitutional standards, according to the interpretations of the Supreme Court and lesser judiciary. The tainted evidence, however reliable it may be, is "suppressed" from prosecutorial use, so that, in most cases, guilt, though acknowledged, may not be proved. There is a concrete physical reality about a machine gun, a corpse, or a kilo of heroin. Yet in countless prosecutions tangible evidence is routinely excluded, in furtherance of the belief that through suppression of an ill-gotten truth a higher truth will emerge, in the form of a more nearly perfect legal system.

Ironically, if the police search someone unlawfully and turn up nothing, the victim of the search finds no solace in the exclusionary rule. A law-abiding citizen, harassed by unreasonable intrusions, cannot redress his grievance through the suppression of evidence, for there is none. Whether or not the scale has actually tipped in favor of the criminal, that is the way many people perceive it.

Americans increasingly feel under siege, with too many remaining fearful behind locked doors. Few if any citizens, however, would trade the fear of going out at night for the dread of the midnight knock on the door from the police. Although we may seem to be a long way from the police state, we must be ever mindful of the danger. The exclusionary rule was designed to keep such oppression at bay.

LET US LOOK at the rule in action: police officers, on patrol, see two masked men flee from a jewelry store in an unidentified late model, light-colored car. The officers approach the premises and see the proprietor on the floor, bound and shot dead, his display case ransacked. No witnesses. Several hours later, in a neighboring town, other police alerted to the crime see two men traveling a little too slowly in a light-colored car. They stop the car and inquire. The answers are unhelpful. With only their intuition to rely upon, the policemen search the car and find the stolen merchandise, the murder weapon, and the masks. Arrested, confronted, and told of their rights, the suspects

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David Suter

confess to robbery and to murder.

Nevertheless, they will go free. The search, despite its empirical success, would be held unconstitutional in the opinion of most American courts. No evidence resulting from it could be used against the criminals. The inexact suspicion of a police officer, however validated, is no proper yardstick. No search may ever be justified by what it turns up. The confessions, too, must be ignored, for they were the product of an improper arrest and a confrontation with "illegally seized evidence."

As another example, Singer tells the police that Moran has a stolen revolver hidden in his apartment. The police get a court-ordered search warrant and seize the gun exactly where Singer said it was. This sort of thing is routine, but often, in spite of the correctness of the information on which the warrant was based, the warrant will be struck down and the evidence excluded, if the warrant is signed without "probable cause." This means enough proof to convince a reasonable person that the criminal evidence is at the place to be searched. If, in presenting the proof to the magistrate, the police omit mention of how Singer knew he was right, the search will be nullified.

The paradox of the exclusionary rule was described sardonically by the late John Wigmore, dean of the Northwestern University Law School and the author of the leading treatises on the law of evidence: "Our way of supporting the Constitution is not to strike at the police officer who breaks it but to let off somebody else who broke something else."

We cannot say that the rule was imposed upon the states in order to convert irrationality into a national policy, nor can we say that it has served no purpose. That it has turned out rather badly is not a strike against the Warren Court so much as it is an outgrowth of implications which were not then foreseen. Perhaps they should have been: the Court was warned by some of its own dissenters, but the misstep occurred in the launching of a social experiment—bold and noble as it was—which did not fully take into account the disinclinations of both police and criminals to be deterred by hollow threats.

Deterrence by punishment is experienced in all forms of human endeavor. A child is warned not to play with fire. He tries, experiences pain, then desists. If anyone is to be deterred from doing anything—the police from misbehavior or the criminal from his crime—the punishment must be swift and certain, as well as sufficiently painful to counterbalance the more immediate reward of the proscribed act.

Applying the deterrence hypothesis, the Court thought that release of a criminal was a sufficiently painful consequence of an illegal search. But the punishment imposed by the release of a mugger does not jolt the police so much as it does the next victim. The cop's hand is not burned by the fire; his palm is slightly singed as the candle is extinguished and the room darkened. The simple truth is that police brass rarely punish or otherwise discipline officers who are, to their way of thinking, guilty only of high-minded exuberance. With the quarry sacrificed, they feel that the disappointed policeman should not be set back further, but, if anything, consoled or promoted for his thwarted civic efforts. The disposition of the case matters, but is not, typically, the ultimate police criterion. It is the arrest and the maintenance of police professional standards that count for respect and advancement. If the courts want to throw out cases—well, that's their business.

With supreme irony, those who pooh-pooh the deterrent effect of punishment on criminal activity are the first to exalt it as a device to curb police misconduct. But if the threat of prison does not deter thieves, how may police misconduct be stemmed by such impersonal penalties as the judicial dismissal of cases? Both failures have a point in common: the sanction is either absent or blunted (in the case of the police) or, in the case of criminals, delayed, diminished, or denied.

Delayed. Constitutional exclusionary battles involve judges in the adjudication of pretrial contests which have nothing whatever to do with guilt or innocence. Guilt is assumed. The defense attorney exhorts the court to throw out a case solely because it is composed of incriminating evidence claimed to have been improperly taken from his client's pocket, house, or car. Hours, days, and sometimes weeks may be spent on even one such claim. Court calendars are bloated with hearings arising out of an obsession with procedure in which guilt or innocence is irrelevant; for the exclusionary rule excludes, of all things, the truth itself.

Diminished. Unsure of the unassailability of a search warrant, of the legality of a search, or of the truthfulness of its avowed circumstances, the prosecutor often finds it expedient to bargain with the defense despite unerring proof of guilt. The police seize an illegally possessed gun; when the defendant claims it, he gets a discount in culpability because there is a legal shadow over the seizure.

Denied. If the shadow is too long, the proof is suppressed entirely under the rule.

Of course, offenders are sometimes caught and jailed. Yet, the rule operates even for them with freakish inconsistency. Bumble and Dodger are caught committing a burglary. Bumble goes to prison because his conviction is somehow free of constitutional or legal flaws. Dodger is luckier; he is sprung by the exclusionary rule. From the viewpoint of the two, there is much to be learned from this. One would like to think that a potential offender perceives some cause and effect between crime and punishment: the teachings of deterrence. But that is by no means the lesson learned by the participants or by the person contemplating a life of crime. The inescapable conclusion is that going to jail has less to do with getting caught than with the fastidiousness of some murky and incomprehensible courtroom procedures.

While intended to curb abuse of police power, the exclusionary rule has opened up a whole new field of police misconduct: perjury. Police officers who testify at suppression hearings have sometimes shown a remarkable facility for adjusting facts to fit the court's constitutional sensibilities. The bad cop, knowing that he acted arbitrarily in pulling the heroin out of his target's pocket, testifies that in fact no search was conducted but that the defendant "dropped" the drugs to the ground when approached. "Dropsy" is a bastard legal phenomenon born of cynicism, and growing in importance with each triumph. Occasionally, however, there is a true dropsy case. To the callous prosecutor, there is no need to differentiate; to the virtuous prosecutor, it is an added quandary.

Moreover, the rule has tarnished the reputation of the conscientious, honest policeman in the eyes of the public, while eroding self-respect within the profession. In most criminal cases there are now, so to speak, two accused: the defendant and the police. To have every move—especially those taken in good faith—challenged, examined, and often condemned, creates incalculable damage to police morale and to public perceptions of law enforcement.

Because the public does not fully understand the exclusionary rule, a victim will see only the outrageous release of his assailant, and may very well assume that someone was paid off. Either way, the ensuing anomie infects the public. With an air of resignation tinged with fear, the victim of crime acquiesces to his lot with scarcely a thought of recourse. "Why contribute interminable hours as a witness against a criminal?" he reasons. "He will only be right back on the street to take revenge." The victim slowly parts company with law enforcement; the cycle is compounded.

DURING THE 1960s and early 1970s, difficult cases arose in which it became necessary to develop the rule with logic and consistency. While each extension of the irrational doctrine may have been internally consistent, the sum of the decisions was irrational—like the addition of floors, in perfect symmetry, to a house built on quicksand. Here is a sampling of further oddities, based upon actual decisions.

Skinner is charged with possession of a switchblade which the state police had, undeniably, found concealed on his person. He blames the police, testifying, at a pretrial suppression hearing, that they took it from him in violation of his constitutional rights. The court disagrees: he does not walk free but is put on trial, at which the prosecution must establish that the defendant had the weapon. The state's attorney is forbidden to so much as hint to the jury that Skinner himself swore that the police took it from his very person. At the jury trial Skinner does not testify and his attorney may successfully convince the jury that his client never had the knife.

Rust is arrested on a weapons charge. He is convicted. His guilt is not questioned by an appeals court, but it nonetheless overturns his conviction because it marks his lawyer incompetent for not challenging the means by which the police got the weapon.

Wedgewood pleads guilty to burglary, admitting a break-in and the theft of a revolver. On appeal, his conviction is reversed when a higher court finds that the police violated his rights in searching him and retrieving the stolen gun without prior justification. His plea of guilty does not bar his challenge or his release.

Enough. These are results which only legalists can fathom. And therein lies the rub. Surely a rule of such profound social dimensions should spring from something closer to social consensus than to judicial or legal dialectic. It is mistakenly assumed that these results are somehow mandated by the Constitution. The Fourth Amendment condemns unreasonable searches, but it does not decree that insult be added to injury, that the public be affronted first by the crime and then by the release of the acknowledged malefactor. Lacking an efficient legislative scheme by which citizens could be guaranteed their Fourth Amendment rights, the Supreme Court chose the exclusionary rule.

The extraordinary irony of that choice is that under the reasoning of the rule, the convictions of Skinner, Rust, and Wedgewood would be fully intact if the searches were conducted by any nonpolice member of the population. The rule does not sour the fruits of a private citizen's search; it blocks only those convictions which flow from bad police searches. Of course the citizen who searches another person risks both a lawsuit and a bloody nose, but the evidence he draws is at least permitted to be of some use.

All of this leads one to suggest that the question of police searches be reexamined. Naturally, there must be an institutionalized procedure of complaint and recompense for those whose privacy is unjustly shattered, but not if it allocates disproportionate windfalls to the guilty and nothing to the innocent.

At present, courts which routinely deal with challenges to search warrants are reluctant to release offenders who argue that the damning evidence was seized under a faulty warrant. In order to "save" the warrant which gave up a corpse, judges will sometimes engage in tortuous legal sophistry, while righteously suppressing the gram of marijuana seized under a comparably deficient warrant. The result is a jumble of precedents and standards not easily reconciled by a judge who must decide when to issue a particular search warrant. If the warrant is applied for and issued in good faith, the criminal should not be allowed to turn the results of a magistrate's understandable confusion into an escape hatch.

The exclusionary rule does not distinguish between blunder and malice. It should. If the police officer is wrong, if he lacks the legal savvy to guide him through the most arcane legal distinctions, his search will be aborted, just as though he acted out of the vilest motivations. It is not at all uncommon for an appellate court to divide, four to three, over whether a police officer was authorized to conduct a particular search without a warrant. The police officer has the unenviable duty of deciding, in the heat of the moment, whether his conduct will eventually be approved by the four or by the three. If he makes an educated choice that the court's majority does not prefer, he will be judged the "offender," and the criminal "the victim." The *level* of constitutional misconduct should have some place in these matters.

Cases may be imagined, to be sure, in which the behavior of the police is so contemptuous that exclusion of the ill-gotten evidence is a necessary sanction. But where the conduct is merely mistaken, we ought to compare our own legal practices with those of the rest of the world.

To recommend lifting the exclusionary rule is not to advocate eliminating safeguards against abuses of power. The choice should not be between repression and what we have now. Consideration of civil lawsuits against police agencies, with the awarding of money damages, raises the specter of the medical malpractice morass, but a workable system may be fashioned. We can learn from the experiences of other eminently democratic countries, England and Canada for example, which use such a system. The solution will not be simple, but the time has come to seek a new way.

The exclusionary rule is, perhaps, the boldest experiment in enforcing civil liberties that has ever been launched. To have tried it is very much to our credit. To recognize that it is no longer tenable will be even more so. ■

HARPER'S/JULY 1977

Interview With William H. Webster, Director, Federal Bureau of Investigation

Why the FBI Uses Undercover Agents

Covert operatives neither "create crime" nor "entrap" the innocent, asserts the chief of the elite law enforcement agency in answer to charges by critics on Capitol Hill.

WARREN K. LEFFLER—USN&WR

Q Judge Webster, the FBI's undercover operations have stirred the sharpest criticism of the bureau since Watergate. Do you have any misgivings about the bureau's expanded use of undercover techniques?

A None whatever. The kinds of crimes the FBI is giving high priority to today—bribery, gambling, narcotics, theft of technology, other white-collar violations—often require undercover work. They are so-called consensual crimes. There is a willing participant on each side, so it is difficult to come up with someone willing to be a material witness to the crime. Bribery is not conducted in the middle of 12th and Market streets.

Undercover operations, usually coupled with a cooperating witness or an informant, permit us to get inside a criminal apparatus and stay there long enough to find out how it works and who the players are. Undercover work is an exceedingly cost-effective method of getting at problems that could not be solved in any other way.

Q Cost effective by what measure?

A We have fewer than 200 agents working in these operations, including supervisors. That's only 1 percent of our total personnel resources, so it's not as if we were becoming an army of thespians. In 1980 and 1981, we spent some 7.5 million dollars on undercover work, exclusive of the agents' salaries.

But during the same period, we recovered through these operations about 109 million dollars in property, made over 2,000 arrests and got more than 1,000 convictions.

Q Much of the criticism of the bureau has focused on the Abscam operation, in which FBI operatives posing as an Arab sheik and his confederates offered bribes to members of Congress. A special Senate committee is now asking this question: Is it proper for the FBI to test the virtue of officeholders by trying to corrupt them?

A That is not our purpose. Our purpose is to follow leads. When we have leads that take us into allegations of public corruption, we follow them—whether it involves a state legislator, a corrupt law-enforcement officer or even members of Congress. It would be wrong for us—and the American people would disapprove—if we were to turn away from any allegation of public corruption simply because of the potential for flak.

Abscam did not start as a public-corruption investigation. It started as an investigation of stolen art, and we were led by the corrupt middlemen we were dealing with to lawmakers they told us were corrupt.

Q How does the FBI decide to make someone a target of investigation?

A Target is a new word in law enforcement, and in many ways it is an unfortunate word. It suggests that we pick out people and then go after them to prove they're guilty of something. This is never the case.

We go after allegations to determine whether or not they're true. If the allegations take us to a particular individual, then he or she becomes the subject of the investigation.

In the case of the employes of the two Japanese companies, for example, who were recently indicted, we weren't investigating Japanese businessmen. We were just following leads in an investigation of the theft of high technology.

That's been our approach—we target the alleged activity, not individuals. The Oklahoma county-commissioners cases furnish another example of this.

Q Are you speaking of the contract-kickback scandal?

A Yes. Our agents set up a business and by posing as contractors were able to identify the target, which was the pervasive corruption of Oklahoma county officials who were demanding 10 percent kickbacks on county contracts. It had even gone so far as to result in a standard 50-50 split between contractors and commissioners for fictitious contracts—work that wasn't done at all.

Our undercover agents identified how this was done and then went to work gathering evidence on individuals. Well over a hundred persons have been convicted or have pled guilty. An almost equal number have agreed to plead guilty, others are awaiting trial and still others remain under investigation.

Q There is an old saying, "Every man has his price." Isn't there a danger that by offering a politician a hefty bribe, the FBI may lead astray someone who previously was honest? Do you know for a fact that those caught in the Abscam net committed earlier crimes?

A I am not in a position to say that the ones who were convicted had committed 10 crimes that year or taken 15 bribes or whatever. I don't know that.

But remember, we worked through influence peddlers who did not know they were dealing with the FBI. They thought they were dealing with a sheik and a sheik's representative who were ready to pay a lot of money for crooked acts. These influence peddlers brought the lawmakers to the undercover agents. And, except for Senator Harrison Williams, the lawmakers usually came and were gone rather quickly—in about 45 minutes to an hour.

In response to a bribe offer, corrupt politicians often start off by saying, "No, I'm not interested." They will dance around the barn with you until they feel comfortable that you're all crooks together, and then they'll take the money. We didn't make flagrant, repeated efforts to get these people to take the money.

Q You didn't do anything that constituted entrapment?

A No. We have had eight juries in the Abscam case—96 jurors—and none of them has found entrapment. If we had led somebody into a crime who was not predisposed to it,

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In Abscam, influence peddlers brought public officials to a Washington house where an FBI agent posing as an Arab sheik offered bribes.

that would be entrapment as the courts have defined it. But we did not do that.

Q As you know, Senator Larry Pressler sharply criticized the FBI for offering him a bribe as part of the Abscam operation—a bribe he refused immediately. Why was Pressler approached in the first place?

A Here's how it happened. A corrupt influence peddler had arranged to bring another public official to the Georgetown house the Abscam agents were using.

An hour or two before the appointment, the influence peddler called and said he was bringing Senator Pressler instead. He assured us that Pressler knew the purpose of the meeting was to hear a bribe offer, which we learned later was untrue.

Now, if we did not let Pressler come, our refusal would cause the influence peddler to become suspicious. So—and I accept full responsibility for this—we let Pressler come, knowing that if he was innocent, he would be protected: He could simply say "No," which is what he did.

Q Is the videotaping of these bribe-offering sessions an important aid to prosecutors?

A Yes. We have had situations—not in Abscam but in other cases—in which people are saying they don't want any money and at the same time are writing an amount on a piece of paper and showing it. That is not as unusual as you would think.

We've also had situations in which the jury learns a lot from facial expressions, such as whether the person was uneasy or didn't want to take a bribe, or whether he was pushing for the money, reaching for it.

Q Some eyebrows have been raised in Congress over the amount of money—$250,000 over three years—that the FBI paid to Melvin Weinberg, a convicted confidence man who worked with the bureau in Abscam. Do a lot of FBI operatives receive this kind of pay?

A No. I think that would rank significantly higher than any payments that I can recall. But the courts have found the amount was reasonable under the circumstances. The man was on 24-hour call for several years, during which he didn't have the ability to earn any other income.

When you are dealing with a cooperating witness of this kind, he is very apt to engage in criminal activities on the side if he does not think he is being treated fairly. Weinberg knew it was the FBI he was working for, unlike the influence peddlers involved in Abscam.

Q Why does the bureau put convicted felons like Weinberg on its payroll?

A For several reasons. We cannot turn our undercover agents into instant pals of the crooks we are investigating. We need someone to vouch for our agents—to represent that they are just as crooked as the people they are dealing with. Also, we often need someone to explain the operations of these complicated confidence games to us. The motives of a cooperating witness vary from revenge to reward.

Q When the FBI employs a man celebrated for his skills as a swindler, doesn't it give him an incentive to engineer crimes of the kind it is looking for?

A No. I reject the idea that we create crime. There was only one incident in which Weinberg arguably coached a public official—and that incident has been reviewed by the courts. It occurred early on, and we remonstrated with him when we found out about it.

Weinberg's role was to provide credibility and to tell us where the crooked middlemen were. The crooked middlemen then produced the politicians. Weinberg didn't know the politicians.

Q How do you insure that undercover operations don't get out of control?

A I have formed an Undercover Operations Review Committee, which has the job of spotting potential mistakes before they happen. If they do happen, this group makes sure they don't happen again. The committee keeps a close watch: We have a whole notebook full of procedures designed to materially reduce the chance of hurting third parties, getting innocent people involved or engaging in entrapment.

Still, it comes down in the end to the basic trustworthiness of the FBI. It depends on how carefully I pick people to be agents and how carefully the President picks the director of the FBI. As it is, I think everyone involved wants to live by the rules.

Q Are undercover operations deterring crime?

A Very definitely. For example, in Operation Lobster, we brought down a truck-hijacking ring, and there was only one major hijacking in four New England states in the next six months.

In Henry County, Ga., last year, an undercover operation resulted in the arrest of the sheriff, the chief of police, the probate judge and the manager of an airport who were providing a safe landing and escort service for drug dealers coming through Atlanta. We broke that open by pretending to be a customer.

And then there was Operation Bancoshares, which was a big success.

Q What did that involve?

A Drug dealers in Florida were laundering their money—disguising its origins—before it went into the banks to make it more difficult for us to trace. So we went into the laundering business—we became a broker. In one operation, we laundered over 170 million dollars in cash. Dealers were bringing money to us so fast that they didn't have time to count it; they weighed it. We bought a counting machine to count the bills.

When we finished gathering evidence, we indicted more than 60 persons—45 of whom were arrested in this country. The rest are back in Colombia. We smashed four of the top seven drug cartels. We seized 20 automobiles, seven airplanes, a 4-million-dollar ranch, drugs, guns, ammunition, 6 million dollars in cash, and impounded 11 million dollars in bank accounts.

Q How much success has the bureau been having in the battle against the Mafia?

A I believe the record is impressive. Look at the indictments and convictions of people at the very top of La Cosa

Nostra in the last two years: Joseph Bonanno, Sr., who has been one of the top figures in organized crime for over 30 years; four top members of the Los Angeles "family"; Nick Civella, the head of the Kansas City family; Carlos Marcello, head of the family in New Orleans; Frank Tieri of the old Genovese family in New York; members of the Bruno family in Philadelphia; the top La Cosa Nostra figures in Cleveland. Others have been indicted in Chicago, Milwaukee and Las Vegas.

This record sends a clear signal to the button men, the foot soldiers of LCN, that the promise of respect and protection that they get when they're taken into membership may not hold much water if the top figures in their families can't survive an FBI investigation.

Q Are these gains against the Mafia largely the result of undercover work?

A In part. We now have in 28 cities a computerized index of intelligence information on organized-crime families. We are able to identify the hierarchies and often penetrate them through informants. Increasingly, we find cooperating witnesses willing to work with us. That was the case in the conviction of Joseph Bonanno, Sr., which is an interesting story.

A man named Lou Peters, who ran an automobile dealership in Lodi, Calif., was approached with an offer of 2 million dollars for his business. He knew it was worth a million dollars, but he wondered why anyone would pay 2 million. When Mr. Peters sniffed around, he found the offer was coming from the Bonanno crime group, which wanted a place to launder its money in a sleepy town in northern California.

So Mr. Peters came to the FBI and worked with us undercover. The result was an obstruction-of-justice conviction of Joseph Bonanno, who had never been convicted of a felony before in his 30 years as a major figure in organized crime.

Q What happened to Mr. Peters? Did he have to go into hiding from the mob?

A The undercover operation was so risky that he got a legal separation from his wife so that his wife and children wouldn't be under any threat of intimidation. Then he learned he had terminal cancer, and he has since died.

When I talked to him, he said that if he had known that he'd spend the last part of his life helping the FBI in this kind of case, he'd do it again, because it was the only right thing to do. We have a lot of good citizens who will work with us.

Q Some lawmakers have accused the FBI of doing a slipshod investigation of Raymond Donovan before he was appointed Labor Secretary, and then withholding from the Senate some information relevant to the question of whether Mr. Donovan had any mob ties, as alleged. Are you satisfied with the bureau's handling of this matter?

A There isn't any investigation of any kind that we can't do better the next time. But I am satisfied that in the time allowed we delivered to the White House the substance of all allegations that were later considered by the special prosecutor.

Also, I have not found any purposeful deception of the Senate, nor have I found any evidence that material not given to the Senate would have caused any senator to change his vote on the nomination.

Man charged with technology theft, a crime that "requires undercover work."

Q Last January, the FBI was given joint responsibility with the Drug Enforcement Administration in the battle against illicit drugs. How is that working out?

A Very well. The bureau has developed over 650 quality drug investigations since then. The FBI and the DEA are working well together against narcotics, which is the No. 1 crime problem in the U.S. We have pulled our two ships alongside each other. The DEA's entrance requirements have been raised, and a lot of cross training between the two agencies is taking place.

Q Are you at all concerned that the Palestine Liberation Organization may begin a campaign of terrorism in the U.S. and elsewhere if it is expelled from Lebanon?

A We are always on the alert for potential problems such as you describe. I'll make no predictions about what the PLO will do. As for terrorist acts in the U.S. generally, the numbers are down from 1977, when there were about 100 incidents. In 1980, we had 29 incidents. Last year, it was 42.

Our main domestic Achilles' heel—if I can call it that—is the Puerto Rican terrorist movement. Its members want independence for Puerto Rico, which less than 3 percent of the population of Puerto Rico wants. This terrorist movement is small, but it continues to stage incidents in places such as New York and Puerto Rico.

Q Is the problem of foreign espionage worsening?

A It is, because the number of foreign intelligence officers in this country is growing. There is a relationship between the size of embassy staffs and the number of intelligence officers, and the size of embassy and United Nations mission staffs is up.

Also, the number of FBI agents available to work on foreign counterintelligence matters has not kept pace with the number of foreign officials in this country. Consequently, we are at a disadvantage. The increased number of foreign officials here doesn't include those who have been infiltrated into our society under deep cover.

Q What are these spies after?

A One of our major concerns right now is technology transfer, the efforts of foreign-intelligence services to obtain illegally the fruits of our research and technological development. That is the top priority of the Soviet bloc's espionage apparatus.

Q How has the bureau fared in the budget cuts of recent years?

A Since 1976, we have shrunk from 8,600 agents to 7,800 agents. A conscious effort has been made to cut us as little as possible, but inflation has had its effect on our budget. We are very labor intensive—72 percent of our dollars go for people.

Q Has the morale of agents been hurt by the criticism the FBI has been subjected to on Capitol Hill?

A No. We know the American people are solidly behind the Abscam investigations. The FBI is having enormous impact on crime, and there's a lot of pride in the ranks. We are attracting 500 to 600 applications for the job of special agent every month, including a great many extremely capable young men and women. Morale is top-notch. □

Buggings, Break-Ins & the FBI

James Q. Wilson

THE indictment, on April 10, of three former high-ranking officials of the Federal Bureau of Investigation for having directed agents to use surreptitious entries—"black-bag jobs"—in an effort to locate Weather Underground fugitives raises important questions, not simply of the guilt or innocence of the accused, but of the relationship between constitutional guarantees of privacy and the problems of investigating well-organized conspiracies. We do not want the police breaking into our homes or rifling our mail; we also do not want political terrorists or organized-crime syndicates operating in defiance of the law because of their invulnerability to conventional investigative techniques. A line has to be drawn, but so far the government has not done a very good job of drawing it.

L. Patrick Gray, W. Mark Felt, and Edward S. Miller were indicted for conspiring to "injure and oppress citizens of the United States who were relatives and acquaintances of Weatherman fugitives, in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution," including the right to be secure in their homes against unreasonable searches and seizures. This they did, the indictment alleges, by causing FBI agents to break into the homes of those "relatives and acquaintances" in New York and New Jersey.

Black-bag jobs have been used by the FBI for at least thirty-five years. By its own admission, the Bureau made at least 238 surreptitious entries of homes and offices of persons judged to be domestic-security risks between 1942 and 1968, and they also made an unknown but large number of such entries into the homes and offices of persons believed to be involved in foreign espionage. No experienced counterintelligence officer doubts that the secret police of virtually every other nation in the world make use of such techniques also.

Why, then, were the break-ins that occurred in the early 1970's, allegedly authorized by Gray, Felt, and Miller, singled out for punishment? And if these men are punished, are there any grounds on which break-ins can be justified? To answer these questions, one must first understand the history of unconventional investigative techniques and the changing, and still uncertain, nature of the law governing such matters.

FOR many years, the FBI distinguished between investigations designed to gather intelligence and those designed to gather evidence. Gathering intelligence—background information about the associations, movements, abilities, and intentions of persons or groups—was not thought to be limited by the constitutional prohibition against "unreasonable searches and seizures." If intelligence information was not introduced as evidence in a criminal trial, then no one was harmed by the gathering of that information. In this view, even actions that seemed clearly illegal under existing law could be interpreted as exempt from such restrictions if the matter involved foreign intelligence or subversive activity, or if higher executive authority—the Attorney General or the President—authorized it.

For example, the Federal Communications Act of 1934 made it illegal to "intercept and divulge" telephone communications, and the Supreme Court held three years later that evidence obtained by such unlawful wiretaps could not be introduced into a federal criminal trial. But Attorney General Robert Jackson ruled in 1941 that it was proper for the FBI to intercept such communications—i.e., to engage in wiretapping—provided it did not "divulge" them. From then until 1967, the right of the FBI to wiretap was not successfully challenged.

Wiretapping does not ordinarily involve physically entering someone's home or office. A tap can be arranged outside the building, at a telephone junction box, or even at telephone company headquarters. Because of the absence of surreptitious entry, the Supreme Court held that wiretaps were not a violation of the Fourth Amendment to the Constitution. Until 1967, wiretaps carried out without judicial warrants were not unconstitutional and, provided they were not used to produce evidence introduced in court or otherwise divulged, they were not even clearly illegal.

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Investigations involving actual physical trespass were a different matter. Entering a home or office is obviously necessary if one wishes to plant a hidden microphone (a "bug") or to obtain or copy documents without the knowledge of the occupants. Trespass for the purpose of placing a bug in internal-security cases was approved by various Attorneys General, at least as far back as Herbert Brownell in 1954.

The Brownell memorandum, addressed to J. Edgar Hoover, specifically authorized microphone surveillance in cases involving "espionage agents, possible saboteurs, and subversive persons" not only for the purpose of getting information useful in a prosecution, but also in furtherance of the FBI's "intelligence function in connection with internal-security matters." The memo explicitly recognized that placing these microphones would often involve trespass and that when trespass occurred it might affect the admissibility into court of any evidence gathered, but stated that this possibility should not limit the use of the technique for intelligence purposes.

Succeeding Attorneys General were aware of this practice, and on occasion reaffirmed its propriety, albeit with modifications. Hoover notified Attorney General Byron White in 1961 of the use of bugs in internal-security matters. In 1965, Attorney General Nicholas Katzenbach issued new instructions requiring written approval by the Attorney General in advance of any bugging. Though these bugs were to be limited to "national-security" cases, Katzenbach told Hoover that he would continue to approve requests for bugs and saw "no need to curtail any such activities in the national-security field."

In the mid-1960's, an argument broke out between Hoover and Attorney General Robert F. Kennedy as to whether Kennedy had authorized bugs in the field of organized crime (clearly not a "national-security" area). Charges and countercharges flew, and the facts may never be known with certainty. Victor Navasky, in his book, *Kennedy Justice*, concludes that Kennedy may not have known, but that several of his subordinates did, that Kennedy himself should have known, and that in any event it would have been hard to explain how the FBI knew in such great detail the activities of organized-crime figures (the vigorous investigation of whom had been pressed by Kennedy) if they had not had microphone surveillances in place.

Surreptitious entries for the purpose of reading mail or copying documents, rather than for the purpose of installing bugs, were probably not known to or directly authorized by the Attorney General. That, at least, is the conclusion of the Church Committee (the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities) contained in its 1976 report, and it is bolstered by an FBI internal memo in July 1966 saying that "we [the FBI] do not obtain authorization for 'black-bag' jobs from outside the Bureau." Such methods, the memo continued, are "clearly illegal," though an "invaluable technique in combating subversive activities."

But if the Attorney General was not involved in authorizing black-bag jobs, he had been involved in authorizing bugging, and the latter, like the former, usually involved surreptitious entry. Indeed, one could argue that a break-in for the purpose of planting a bug was a greater invasion of the privacy of a person because the microphone would pick up everything said in the room, whereas an entry for the purpose of obtaining documents would only compromise a person's privacy to the extent that there were documents in the room of interest to the FBI. If these distinctions—or lack of distinctions—were ever talked out in the Department of Justice, there is no published record of it.

In 1966, Hoover ordered an end to black-bag jobs, repeating his orders in January 1967 with a memo stating that he did not intend to approve any more such requests. Apparently, however, some entries continued into 1968, but by then the practice had in fact ended, according to sources both within the Bureau and on the staff of the Church Committee. Before the resumption of the methods in the early 1970's, several important legal developments had occurred.

IN THE late 1960's, the Supreme Court began to restrict significantly the power of the government to use various surveillance techniques. In 1967, it ruled that both wiretaps and bugs were searches within the meaning of the Fourth Amendment and thus would have to be "reasonable" and based on a judicial warrant. Congress responded by passing Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which set up a procedure whereby federal law-enforcement agencies desirous of using a wiretap or a bug would apply to the Attorney General for permission, who in turn would authorize an application for a warrant from a federal court. These became known to investigators as "Title III's," and the FBI as well as other federal agencies began using the Title III procedure to gather evidence for criminal proceedings.

A Title III tap or bug would not ordinarily be appropriate in an intelligence case, however. For one thing, a Title III electronic surveillance can only occur if a judge finds that there is probable cause to believe that the person being tapped or bugged has committed, or is about to commit, a federal crime, that the information obtained will bear on that offense, and that the location at which the tap or bug is installed will be used in the commission of the crime. Intelligence gathering, however, is not ordinarily based on the belief that a crime has occurred or is about to occur. Rather, intelligence work seeks, among other things, *to find out* if there are grounds for believing a crime is in the offing. For example, one might wish to learn what relationship exists among persons reputed to be members of organized crime or to discover the pattern of associations of a person in this country with a Soviet passport who may or may not be a spy for the KGB.

Moreover, the Title III procedure requires the judge who authorizes a wiretap or bug to disclose that fact to the person tapped or bugged no later than ninety days after an application for a warrant has been denied or an approved tap has been completed. Obviously, in the delicate cat-and-mouse game of international espionage and counterespionage, it would be a little silly to send to someone you suspect of being a spy a letter that says, in effect, "We think you are a spy and we have tried to tap, or have recently been tapping, your telephone to find out if our hunch is correct."

To deal with this, Congress put into the 1968 bill a somewhat murky paragraph saying that the law would not "limit the constitutional power of the President to take such measures as he deems necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign-intelligence information deemed essential to the security of the United States, or to protect national-security information against foreign-intelligence activities."

This provision was interpreted as authorizing wiretaps and bugs, without a judicial warrant, in national-security cases and in cases where there was a threat, even of domestic origin, of the forceful overthrow of the government or any other clear and present danger to the structure or existence of the government. From 1968 on, the Attorney General was frequently asked to authorize warrantless surveillance in security cases. What constituted a "security case" was obviously a matter of interpretation unconstrained by any statutory language. During the Nixon administration, warrantless electronic surveillance was used against the New Left, the Black Panthers, various journalists, certain members of the executive branch, and others.

In 1972, the Supreme Court tightened the constraints even more. In Michigan, a person named Plamondon was arrested and charged with having dynamited the Ann Arbor office of the Central Intelligence Agency. In the legal maneuvering before the trial, the government admitted that it had placed Plamondon under electronic surveillance without first getting a warrant, relying on the national-security provision of the 1968 Safe Streets Act. The Supreme Court was asked to decide whether this warrantless surveillance was a violation of the Fourth Amendment's restriction against unreasonable searches. The Court decided it was, and ordered the government to make full disclosure to Plamondon of his overheard conversations.

This was the famous *Keith* decision, now the controlling decision in matters of this sort. The Court's view, expressed in a unanimous decision (Justice Rehnquist taking no part), was that the national-security clause of the 1968 law did not confer any power on the President and specifically did not authorize him or the Attorney General to use warrantless electronic surveillance against "domestic" threats to security of the kind presented by the behavior of Plamondon. The Court explicitly limited the scope of its decision to the "domestic aspects of national security" and refrained from saying anything about the issues that might be involved in the activities of foreign countries or their agents. Moreover, it recognized that gathering information in domestic-security cases, as opposed to instances of "ordinary crime," might well require different procedures, and it invited Congress to define what these procedures should be. But warrantless intrusions in domestic-security cases were unacceptable. Domestic-security taps were stopped.

The effect of the *Keith* decision was to call into question the traditional distinction made by the FBI between intelligence and prosecution and to create in its place a different distinction, one between "domestic" and "foreign" cases. The Justice Department, following the *Keith* opinion, limited the use of warrantless electronic surveillance to cases involving a foreign power or its agents, though even then it defined "foreign" rather broadly—in the mid-1970's it authorized a warrantless wiretap against the Jewish Defense League on the grounds that its protest actions directed at the Soviet Union were jeopardizing our relations with that country.

President Carter accepted the domestic/foreign distinction when he issued his executive order on January 26, 1978 defining the duties and responsibilities of various intelligence agencies. It set forth a series of restrictions on surveillance techniques—essentially, requiring each to be based on a warrant issued by a judge when the object of these techniques was a "United States person." A United States person is a citizen of the United States, an alien lawfully admitted for permanent residence, or an American association or corporation. Surveillance without a warrant—including placing bugs and presumably carrying out black-bag jobs—could only occur if the object were not a United States person or if the Attorney General had determined that the United States person was "an agent of a foreign power."

Congress now has before it a bill, already passed by the Senate, that would in effect replace this executive order with a law covering many of the same topics and creating new machinery to deal with the same issues. It also is based on the domestic/foreign distinction but differs from the executive order in that it would require the issuance of a special kind of warrant, from a specially created court, for surveillance in national-security cases. (The requirement to show "probable cause" and to disclose the surveillance that governs the use of taps and bugs in ordinary criminal cases would not exist in the foreign-power cases.)

THE black-bag jobs that Gray, Felt, and Miller are charged with having authorized all occurred after the *Keith* decision was handed down, and they were directed at an organization—the Weather Underground—not very different from the group that worked with Plamondon in dynamiting the CIA office in Ann Arbor: presumably domestic in nature and thus, according to the *Keith* ruling, covered by the constitutional requirements that a warrant be issued before the search is conducted.

A central issue—in the trials to come, perhaps *the* issue—is why these black-bag jobs were carried out after Hoover had earlier ended them and after the Supreme Court had made it clear that it would not accept an "intelligence" justification for them.

Persons in the Bureau and officers of the Society of Former Special Agents have argued that those who carried out the break-ins were doing exactly what the White House and the Attorney General wanted. The present Attorney General, Griffin Bell, has stated that he has found no evidence of any higher authority for the break-ins. Tom Wicker in the pages of the New York *Times* has scorned as a "Nuremberg defense" the arguments of Miller and Felt that they had authority; William Safire, in the pages of the same newspaper, has called Gray a scapegoat and President Carter a hypocrite.

I have recently had occasion to study the criminal-investigation procedures of the FBI, and have come to one conclusion that I admit colors my judgment of the present case, even though I can claim no special knowledge of it: important, politically sensitive actions in the FBI rarely occur by accident or in a fit of absent-mindedness. I am inclined, in matters of this sort, to look for a Prime Mover.

The black-bag jobs began again, so far as we can determine, in the early 1970's. The only relevant events that occurred at about the same time were the drafting of the Huston Plan in 1970 and the death of Hoover in 1972. In June 1970, an Interagency Committee on Intelligence, of which Hoover was a member, sent to President Nixon a report on the threat posed by militant New Left and black extremist groups. The FBI made it clear that it opposed reinstituting black-bag jobs (it also opposed covert mail openings). Tom Charles Huston, the staff assistant to President Nixon who was responsible for directing the committee's work, complained bitterly and at length to his superior, H.R. Haldeman, about what he called Hoover's "totally unreasonable," "detrimental," and "specious" objections to every suggestion for improving domestic intelligence. Huston urged Haldeman to urge the President to overrule Hoover and direct him to comply with the plan for expanded intelligence work.

The published record, collected by the staff of the Church Committee, does not make clear what then happened. On July 14, 1970, Haldeman wrote Huston that "the recommendations you have proposed as a result of the review have been approved by the President," apparently an indication that the Huston Plan was to go into effect. Huston then drafted a memo to Richard Helms reporting that the President had decided to remove restrictions on, among other things, surreptitious entries. But on July 27, Hoover wrote to Attorney General John Mitchell (who, strangely, had not been informed of the plan), indicating his disagreement with the plan and stating he would comply only if he received "specific authorization" to use the more sensitive investigative techniques.

The record does not show what Mitchell's response was, but in August of that same year, we find Huston writing to Haldeman about how he might handle a forthcoming meeting with Mitchell and Hoover which was apparently called for the purpose of getting Hoover to go along with the new policies. Thereafter, the public documentary record runs out.

Members of the Justice Department have told me they can find no record that Hoover was finally ordered by Mitchell or Nixon to resume black-bag jobs. The records of the Church Committee show no such order. The FBI has not produced a document confirming such an order to Hoover. And the popular belief, as well as the view of members of the Church Committee, is that the Huston Plan was never implemented.

But was it? Proving that something did *not* happen is often impossible. In this case, there remain some grounds for believing that Hoover may have received and acted on orders calling for black-bag jobs. John Dean was later to testify that he thought the Huston Plan had gone into effect, and he was a member of the Intelligence Evaluation Committee. Perhaps most troubling is the statement attributed to William C. Sullivan, former head of the Domestic Intelligence Division of the FBI, that Hoover had said that break-ins were to be approved. Sullivan, unfortunately, was killed in a hunting accident and cannot testify. After Hoover died in May 1972, the matter rested with Gray. He has said he never knowingly authorized any illegal conduct. Felt and Miller have said publicly that he did. The Justice Department, in its indictments, refers only to documents prepared and decisions made after Gray became acting director of the FBI.

Ironically, it was the Justice Department's premature and ill-advised indictment of John Kearney, the agent in charge of Squad 47 in the New York field office—the squad responsible for the Weather Underground cases—that led to the documents being discovered on the basis of which Gray and the others were indicted. When Kearney's lawyer, Edward Bennett Williams, filed a discovery motion on behalf of his client, agents in the Bureau went to work with more than ordinary zeal to find evidence that would show, at a minimum, that Kearney was acting on higher orders. Obviously, the Justice Department feels they found it, because the Kearney indictment has been dropped.

But now a further irony: sixty-eight agents who had worked on the Weather Underground case, including some who may have dug out the documents implicating Gray and the others, now face disciplinary action and the strong possibility of civil suits for having followed orders. (Under current law, an FBI agent who acts illegally is personally liable for damages if a judge rules against him in a civil action.) One reason for the impassioned hostility of the agents to the current prosecutions, in addition to the belief that what they did was right, is that the government is throwing them on the mercy of whatever personal-injury lawyers the victims of the break-ins might hire, and raising the possibility that deeds carried out in the belief that they were proper may at some future time be found improper and thus legally actionable.

THE central policy issue will probably not be resolved by the trial, however, and that, of course, is the question of whether black-bag jobs ought to be allowed at all.

The absolutist position—that breaking into private premises without a warrant is never justified—seems to have relatively little support in the executive branch or in Congress, though, as we shall see, it has a good deal of support in parts of the federal judiciary. W. Mark Felt has publicly admitted that he approved an FBI black-bag job at the Arab Information Center in Dallas in the fall of 1972 in an effort to find clues as to possible Palestinian terrorists in the United States. The Justice Department knew this, yet did not make it part of the indictment against Felt and the others. The reason, one presumes, is that such a break-in met the "foreign-agent" test of the *Keith* decision.

Moreover, in the back-alley struggle with foreign-intelligence agencies, break-ins are a fact of life. No one wishes to talk much about this, but it is obvious that it will be easier for the National Security Agency to crack a foreign code if a federal agent has placed in its hands a copy of the code book. These code books are not for sale at Brentano's.

The Senate, in approving the wiretap bill by a vote of 95 to 1, has clearly given its blessing to the foreign-agent exemption from normal warrant procedures. Though called a wiretap bill, in fact it covers much more than the interception of telephone communications. It will allow federal agents to engage in almost all forms of "technical coverage" of persons falling under the foreign-agent classification, provided that the agents first obtain the permission of a specially constituted court that will not be required to follow the normal standards governing the issuance of warrants in criminal cases or to issue notification to the party under surveillance. Technical coverage includes beepers to trace vehicles, hidden cameras, and bugs, as well as phone taps. To place the cameras or bugs, a surreptitious entry will obviously be necessary.

If the Senate is prepared to support this, it is hard to see why it would not also support a break-in for the purpose of a physical search. Indeed, as I have already pointed out, a search involves a lesser intrusion into the lives and privacy of the residents of a home or office than a hidden bug or camera. The latter will record everything that transpires in the room, whether or not it is related to an intelligence matter. A search, by contrast, can only pick up documents or other physical evidence; it cannot record the love life of the occupants.

One reason why searches have been given less careful attention by legal draftsmen may be that black-bag jobs have acquired so sinister an implication, by virtue of their use by the "Plumbers" who broke into the offices of Dr. Lewis Fielding (hardly a "foreign agent"), that no one wants to face the question of the circumstances under which they might be legal. Wiretaps and bugs, though controversial, have been associated with success as well as embarrassment—for every American journalist improperly tapped, there have been dozens of organized-crime leaders, drug dealers, and foreign spies who have been properly tapped.

In addition, the Bureau itself has always maintained that black-bag jobs were illegal and has rarely, if ever, sought permission from the Justice Department to carry them out. By contrast, there has always been a clear written procedure whereby the Attorney General would approve or deny Bureau requests for taps and bugs, both those requiring a warrant (as in ordinary criminal cases) and those done without a warrant (under the "national-security" exemption in the Safe Streets Act). What has been routinized becomes familiar and acceptable, and thus more easily dealt with when Congress decides to clarify the law on such matters.

It is interesting to speculate about what might have happened had the Bureau sought Justice Department permission for warrantless searches as it had sought it for warrantless bugs. On May 9, 1975, the Justice Department wrote to the United States Court of Appeals in the District of Columbia, which was then hearing an appeal of the conviction of John Ehrlichman for his involvement with the "Plumbers," stating: "It is and has long been the Department's view that warrantless searches involving physical entries into private premises are justified under the proper circumstances when related to foreign espionage or intelligence." (The letter went on to add that the Fielding-Ellsberg break-ins were "plainly unlawful.") A senior Justice Department official recently told me that if the Bureau had made requests for authority to carry out black-bag jobs in suitable cases, it might well have received it.

Instead, the Bureau had a procedure designed to put such techniques in the worst possible light. When the special agent in charge of a field office wanted to use a black-bag job, he requested permission from an assistant director at FBI headquarters. The request was then sent to Hoover (or his deputy, Clyde Tolson) for decision. If approved, the authorizing memo was marked "Do Not File" and kept in special safes in headquarters and in the field for no more than one year (in order to accommodate the needs of FBI inspectors who annually reviewed field offices to make certain, among other things, that nothing was being done without headquarters approval). Thereafter, the "Do Not File" memos were destroyed. Hence, not even the record-conscious Bureau has any accurate count of how many black-bag jobs were authorized. It was this procedure that Hoover terminated in 1966 when he decided to end break-ins.

SUPPOSE one is willing to grant that break-ins, whether to install a bug or photograph a document, are proper, under reasonable controls, in foreign-intelligence cases. Are they ever proper in other cases? That, of course, is the substantive question raised by the Weather Underground investigation.

The members of the Weather Underground were all American citizens. They were also a violent, terrorist group that made and planted bombs. The *Keith* decision, and the Senate wiretap bill, base the applicability of Fourth Amendment requirements for warrants on the domestic/foreign distinction, not on a distinction between ordinary criminals and a terrorist conspiracy. The FBI agents who are protesting the indictments of their former leaders believe that the latter distinction is at least as important as the former. And the discovery motions that the lawyers for Gray, Felt, and Miller will no doubt file will seek documents to show that the Weather Underground had substantial foreign connections.

William Safire has argued, without indicating what evidence he has, that such a foreign connection existed, specifically with Al Fatah. Persons within the Bureau itself have suggested that documents may be produced showing ties between the Weather group and both the Cubans and the PLO.

The courts will have to decide what significance, if any, to attach to such evidence. There is no existing legal standard by which one can easily judge whether an American citizen has ties sufficiently close to a foreign power to make him an agent of that power. Is a Soviet agent only someone on the full-time payroll of the KGB or one who regularly meets with a Soviet courier to drop off secrets? These are the conventional images of an "agent." But what of someone who travels to a foreign country to receive training, or who accepts foreign money to cover the expenses of his organization, or who secretly collaborates, without pay, with foreign powers in the pursuit of their policy objectives? At the extremes, the distinctions are easy to make, but in the middle, where several American dissident groups may well belong, the distinctions will be maddeningly difficult.

And there is no guarantee that the courts will accept the "foreign-power" exemption even if the facts show that a person was in some sense an agent. In the 1975 *Zweibon* case, the Court of Appeals in the District of Columbia suggested that even national-security investigations may require a judicial warrant: "Absent exigent circumstances [such as an imminent threat], *no* wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought." In reaching this view, Judge J. Skelly Wright rejected the arguments traditionally advanced for warrantless national-security surveillance—that the courts are not competent to judge such matters, that the need to obtain a warrant will lead to security leaks, that there will be undue delay, or that there is a significant difference between gathering intelligence and collecting evidence. Since other circuit courts have reached different conclusions, and since even the District of Columbia circuit was divided in its opinion, it is possible the Wright view will not prevail should the matter reach the Supreme Court. But it is also possible that it will.

In short, the foreign/domestic distinction may turn out to be as vulnerable to court challenge as the earlier intelligence/evidence distinction. If all distinctions are erased and all searches or intercepts must meet the same standards for obtaining a judicial warrant, then law enforcement will face some grave difficulties.

They arise from a little discussed feature common to *both* the Weather Underground and the foreign spy cases. To obtain a judicial warrant, whether for a search, a tap, a bug, or an arrest, an investigator must show that he has probable cause to believe that the person in question has committed, or is about to commit, a crime or has in his possession the fruits of a crime. Except in those cases where somebody has witnessed the crime, the showing of probable cause typically depends on having a reliable tip from an informant. This is especially the case if the crime in view is the product of a conspiracy.

Certain groups are less vulnerable to being penetrated by, or deceived by, an informant than others. Among these are domestic political revolutionaries, especially those with strong feelings of mutual solidarity, and foreign spy rings. Whereas a member of a gang of bank robbers might be induced to give information in exchange for money or leniency, a revolutionary or a spy might have a price no government could pay. Domestic-security wiretaps are often for the purpose of gathering just the sort of information that cannot be obtained from an informant.

Yet even if one recognizes, as some judges seem unable to do, that there are reasonable grounds for warrantless surveillances in some cases, one would nonetheless worry about leaving the authority to decide when to use such techniques entirely in the hands of the President or the Attorney General. President Nixon and his associates abused precisely that discretionary authority, thereby lending substance to the fears of those who had earlier questioned the national-security exemption in the 1968 Safe Streets Act.

The need is to supply an independent review mechanism that can prevent unjustified or political uses of the national-security authority without at the same time having to follow the same standards now governing the issuance of warrants in ordinary criminal cases where prosecution, not intelligence, is the goal. The Senate wiretap bill does just this, though without dealing with the problems of physical searches or of domestic terrorist groups. Whether it will survive House scrutiny and judicial challenge remains to be seen.

DEMOCRATIC societies find it difficult to make decisions on matters that require one to consider the view that the Constitution cannot always be the sole guide to permissible government action. On balance, that is probably a fortunate bias when one considers what has been done throughout history in the name of *raison d'état*. But we cannot leave matters at our revulsion against arbitrary power. Terrorism and espionage are ominous facts of life, drawing equally on "domestic" and "foreign" persons with little regard for the niceties of citizenship. Just as there has been a "clear and present danger" test by which to judge the scope of the First Amendment's guarantee of free speech, there may also have to be such a test in judging the Fourth Amendment's prohibition against unreasonable searches. It ought to be possible for Congress to devise such a test and create independent machinery to apply it without having to defend the increasingly dubious proposition that foreign agents are of necessity more dangerous than domestic terrorists.

DEBATE PROPOSITION TWO

Resolved: That the United States Should Establish Uniform Rules Governing the Procedure of all Civil Courts in the Nation

This resolution raises a question as to the possible establishment of uniform rules of civil procedure which would govern suits in all civil courts in the United States. Civil suits are actions between opposing parties seeking vindication of their respective individual or corporate rights. For example, such rights might be asserted with respect to a contract, a personal injury or property damage. Areas of inquiry here might include changes in discovery procedures, an examination of the judicial process as a whole, or an exploration of alternative means of conflict resolution such as arbitration.

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The Adversary Character of Civil Discovery: A Critique and Proposals for Change

Wayne D. Brazil[*]

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"[W]e need to study whether our elaborate struggles over discovery . . . may be incurable symptoms of pathology inherent in our rigid insistence that the parties control the evidence until it is all 'prepared' and packaged for competitive manipulation at the eventual continuous trial."[1]

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[1] Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1054 (1975). While Judge Frankel was focusing in the quoted passage on criminal cases, he obviously intended his concerns and criticisms to embrace both civil and criminal litigation.

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I. Introduction

In his Cardozo Lecture to the New York City Bar in December 1974, Judge Marvin E. Frankel[2] raised some disturbing and fundamental questions about the adversary character of American litigation. After years of participating in various roles in our principal system of dispute resolution, Judge Frankel concluded that "our adversary system rates truth too low among the values that institutions of justice are meant to serve."[3] I share Judge Frankel's concern about the ways particular aspects of our adversary process militate against fair and efficient resolution of legal disputes.[4] This essay is an effort to respond to that concern and, hopefully, to contribute to the "study" of "elaborate struggles over discovery" called for by Judge Frankel.

The thesis I explore is that the adversary character of civil discovery,[5] with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed. The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution. Because these difficulties and burdens are an inevitable consequence of adversary relationships and competitive economic pressures, they cannot be removed by the kind of limited, nonstructural discovery reforms that have been made in the past and are once again under consideration.[6] To come to terms with these problems will require an assault on their sources; effective reform consequently must include institutional changes that will curtail substantially the impact of adversary forces in the pretrial stage of litigation.[7] In the final section of this essay I propose the tentative outlines of an alternative system for gathering evidence and defining issues—a system designed to accomplish the purposes for which civil discovery was intended, while lowering the social cost of our current discovery process.

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[2] District Judge, United States District Court for the Southern District of New York.

[3] Frankel, *supra* note 1, at 1032.

[4] Since I use terms like "fairness," "justice," and "truth" with some frequency in this essay, a few words about what I intend to communicate through the use of these terms are in order. I appreciate that terms like these carry numerous value connotations and contain no self-evident meaning. The meaning I ascribe to these terms, however, is identical, relatively simple, and grounded in fundamentals of the existing system of dispute resolution. "Fairness," "justice," or "truth" in any given case is a functional concept. It is whatever result a duly constituted trier of fact (jury or judge) would reach if it had full access to all the evidence and law that is arguably relevant to the issues in question. "Justice," then, like "fairness" or "truth" is a social product, a product that can result only from a process that reliably exposes all the potentially relevant data.

[5] My focus is on the discovery stage of *civil* litigation. Discovery in criminal matters is an altogether different question. The values and institutions that are relevant and sometimes in conflict in criminal litigation are so different from those pertaining to civil suits that the two systems cannot be evaluated intelligently and constructively within one analytical framework. Since criminal procedure already has developed into an independent body of law there is no need to treat "litigation" monolithically and to insist that all reforms proceed in tandem in both the civil and criminal arenas.

It is worth noting that both of the contemporaneously published responses to Judge Frankel's Cardozo Lecture found the primary weapons for their attacks in arsenals of concerns about criminal litigation. *See* Freedman, *Judge Frankel's Search for Truth,* 123 U. Pa. L. Rev. 1060 (1975); Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea,* 123 U. Pa. L. Rev. 1067 (1975).

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[6] This essay will discuss in detail the major efforts that have been made in discovery reform. One should be aware at the outset, however, that a major review of the federal rules of discovery is presently underway and could result in at least modest changes. The current reform effort was formally launched after the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Members of the Conference had noted that abuse of discovery techniques was widespread, resulting in escalation of litigation costs, delays in adjudication, and coercion of unfair settlements. Responding to these criticisms, the American Bar Association's Section of Litigation appointed a Special Committee for the Study of Discovery Abuse. The Special Committee published its report in October 1977. The American Bar Association, acting through its Board of Governors, officially approved the report on December 2, 1977. A second revised printing of the report appeared in that month [hereinafter cited as *Report of the Special Committee*].

The Section of Litigation presented the *Report of the Special Committee* to the Advisory Committee on Civil Rules (which had been appointed by the Chief Justice of the United States Supreme Court as part of the Judicial Conference program). After considering the Special Committee's proposals, the Advisory Committee submitted a *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure* to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Because the Standing Committee wanted to receive comments on these proposals before considering them, it published the *Preliminary Draft of Proposed Amendments* in March 1978. 77 F.R.D. 613 [hereinafter cited as *Preliminary Draft*]. The Standing Committee established a November 30, 1978, deadline for submission of written comments on the proposed changes. The Standing Committee indicated that detailed consideration of the proposals would commence sometime after November 30, 1978, and that whatever proposals emerged from that body would be evaluated in turn by the Judicial Conference of the United States and the United States Supreme Court.

While the Advisory Committee's *Preliminary Draft* adopts most of the Special Committee's recommendations, its proposals differ in two major respects. The Advisory Committee "particularly" has invited responses from the professional community about these "points of disagreement between it and the Section of Litigation." *Preliminary Draft, supra,* at 627. Because most of the Advisory Committee's proposals substantially are identical to the recommendations of the Special Committee, however, most of the discussion in this essay of the reforms currently under consideration will focus on the Special Committee's report. In addition, I will identify and evaluate the two potentially significant differences between the Advisory Committee's proposals and those made by the Special Committee.

[7] Before alienating all loyalists to the adversary system, I hasten to add that the purpose of the changes I propose is limited. They would not remove all vestiges of adversary proceedings from discovery, but they would seek to confine adversary forces to those aspects of discovery where they have uniquely valuable contributions to make. Moreover, the changes would leave the adversary heart of civil trials firmly in its traditional place.

The adversarial process seems particularly well-suited to the following crucial trial-stage endeavors: (1) determining which components of the data that were collected and organized during the pretrial stage constitute admissible evidence; (2) determining the ultimate facts from the admissible evidence; and (3) determining the legal implications of those ultimate facts. A vigorous dialectic between adversary minds is most likely to produce reliable resolution of the issues these endeavors generate.

II. THE PURPOSES OF DISCOVERY

The purposes that modern civil discovery is designed to accomplish are crucial to a system of dispute resolution committed to justice. In its seminal opinion about the scope of discovery, the United States Supreme Court declared that "[m]utual knowledge of *all* the relevant facts gathered by both parties is essential to proper litigation."[8] Discovery is designed to serve as the principal mechanism by which such "[m]utual knowledge of all the relevant facts" will be achieved.[9] As the Supreme Court of Illinois forthrightly stated, the overriding purpose of discovery is nothing less than to promote "the ascertainment of the truth and ultimate disposition of the lawsuit in accordance therewith . . . ."[10] Six years earlier Judge Irving R. Kaufman had articulated this same view in noting that "[t]he federal rules are designed to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment."[11]

The means the discovery rules provided for achieving this end was the mutual disclosure of evidence or information regarding the existence of relevant facts.[12] In the words of Judge Kaufman, "[t]he clear policy of the rules is toward full disclosure."[13] Nor are these views about the primary purposes of discovery confined to the courts.[14] The draftsmen of and commentators on the original federal rules of discovery shared the conviction that the overriding objective civil discovery was designed to accomplish was the location and disclosure of all the unprivileged evidentiary data that might prove useful in resolving a given dispute.[15]

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[8] Hickman v. Taylor, 329 U.S. 495, 507 (1947) (emphasis added).

[9] *Id.* at 501.

[10] Monier v. Chamberlain, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966).

[11] Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962). At the time he wrote the quoted material, Judge Kaufman, who currently sits on the United States Court of Appeals for the Second Circuit, was a judge in the United States District Court for the Southern District of New York.

[12] 329 U.S. at 501.

[13] Kaufman, *supra* note 11, at 119.

[14] For similarly premised judicial pronouncements on the role of discovery, see United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958), and Nichols v. Sanborn Co., 24 F. Supp. 908, 910 (D. Mass. 1938). The latter case is especially noteworthy because of its close proximity in time to the promulgation of the federal rules and its express reference to the intentions of the drafters.

Minimal reflection reveals a fundamental antagonism between the goal of truth through disclosure and the protective and competitive impulses that are at the center of the traditional adversary system of dispute resolution. While drafters and early proponents of the rules of discovery were not oblivious to that antagonism, they seem to have assumed that the rules themselves would reduce the size of the litigation arena in which adversary instincts and tactics would predominate. They apparently believed the discovery machinery would reduce the role of adversary pressures and tactics in the pretrial process of gathering relevant evidentiary data.

The literature that emanated from the academic and judicial proponents of discovery during the decades surrounding the 1938 adoption of the Federal Rules of Civil Procedure is replete with optimistic forecasts about the beneficial changes discovery would bring to the adversary system. Edson R. Sunderland, who is credited with drafting the discovery components of the 1938 Federal Rules,[16] wrote that the new procedural rules:

> mark the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial. Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game.[17]

Six years earlier, while advocating the discovery reforms that culminated in the Federal Rules, Sunderland had declared that:

> Lawyers who constantly employ [discovery] in their practice find it an exceedingly valuable aid in *promoting justice.* Discovery procedure serves much the same function in the field of law as the X-Ray in the field of medicine and surgery; and if its use can be sufficiently extended and its methods simplified, *litigation will largely cease to be a game of chance.*[18]

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[15] J. MOORE & J. FRIEDMAN, 2 MOORE'S FEDERAL PRACTICE UNDER THE NEW FEDERAL RULES § 26.01, at 2441-45 (1938) [hereinafter cited as MOORE & FRIEDMAN]; Holtzhoff, *Instruments of Discovery Under Federal Rules of Civil Procedure,* 41 MICH. L. REV. 205 (1942) [hereinafter cited as *Instruments*]; Pike & Willis, *The New Federal Deposition-Discovery Procedure* (pts. 1-2), 38 COLUM. L. REV. 1179, 1436 (1938); Sunderland, *Discovery Before Trial Under the New Federal Rules,* 15 TENN. L. REV. 737 (1939) [hereinafter cited as *Discovery Before Trial*]; Sunderland, *Improving the Administration of Justice,* 167 ANNALS 60 (1933) [hereinafter cited as *Improving the Administration*]; Sunderland, *Scope and Method of Discovery Before Trial,* 42 YALE L.J. 863 (1933). *See also* W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 8-12, 18-37 (1968); Holtzhoff, *The Elimination of Surprise in Federal Practice,* 7 VAND. L. REV. 576 (1954) [hereinafter cited as *The Elimination of Surprise*]; Rosenberg, *Changes Ahead in Federal Pretrial Discovery,* 45 F.R.D. 481 (1969); Speck, *The Use of Discovery in United States District Courts,* 60 YALE L.J. 1132 (1951).

[16] W. GLASER, *supra* note 15, at 11.

[17] *Discovery Before Trial, supra* note 15, at 739.

[18] *Improving the Administration, supra* note 15, at 76 (emphasis added).

Similarly, James A. Pike and John W. Willis stated during the year the Federal Rules were promulgated that the federal discovery procedure constituted a major contribution to "the general course of procedural reform" in that it would "strongly stamp the entire federal judicial process with a *character of frankness and fairness* that will go far in aiding our legal system *to overcome the effects of its rather crude heredity*."[19]

James William Moore and Joseph Friedman, co-authors of the first major treatise elucidating the new Federal Rules of Civil Procedure, were equally optimistic about the salutary effects discovery would have on the troublesome features of traditional adversary litigation. Among the benefits anticipated from the mutual discovery provisions of the Rules were "great assistance in ascertaining the truth," "safeguards against surprise at the trial," and detection of "false, fraudulent, and sham claims and defenses."[20] Moore and Friedman also reported optimistically that "abuses of the discovery procedure in jurisdictions where full and equal mutual discovery is permitted appear to be quite exceptional and isolated."[21]

Alexander Holtzhoff, who in 1939 and 1940 was Special Assistant to the Attorney General charged with responsibility for monitoring all federal court decisions interpreting the new Federal Rules of Civil Procedure,[22] declared that the "extremely liberal provisions for discovery" were formulated "with a view to *departing as far as possible from 'the sporting theory' of justice* and to fulfilling that concept of litigation which conceives a lawsuit as a means for ascertaining the truth, irrespective of who may be temporarily in possession of the pertinent facts."[23] Fourteen years later and from the vantage point of the federal bench,[24] Holtzhoff reiterated these views with even less restraint. The Federal Rules of Civil Procedure, he wrote, had "entirely demolished" the "ancient walls" that had been erected in the adversary system of litigation to protect relevant evidence from disclosure. The new procedure, he declared enthusiastically,

> effectively carried out the basic concept that the purpose of litigation is not to conduct a contest or to oversee a game of skill but to do justice as between

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[19] Pike & Willis, *supra* note 15, at 1459 (emphasis added).

[20] MOORE & FRIEDMAN, *supra* note 15, § 26.01, at 2443-44.

[21] *Id.* at 2444.

[22] Tolman, *Foreword* to A. HOLTZHOFF, NEW FEDERAL PROCEDURE AND THE COURTS iii-iv (1940).

[23] A. HOLTZHOFF, *supra* note 22, at 7 (emphasis added). *See also Instruments*, *supra* note 15, at 205, 224.

[24] In the interim, Holtzhoff was appointed United States District Judge for the District of Columbia.

> **the parties and to decide controversies on their merits. For this purpose the courts are entitled to have laid before them all available and pertinent material.[25]**

This array of quotations suggests that the scholars who drafted, critiqued, and promoted the modern rules of discovery expected those rules to reduce dramatically the impact of adversary forces in the trial preparation stage of litigation. As William Glaser noted, the "authors of the Federal Rules consequently intended to use discovery to reform the adversary system; they intended litigation to proceed with both sides in full possession of all facts and with each aware of the other's tactical strengths and weaknesses."[26] These lofty visions of the primary purpose of discovery were not confined to scholars and commentators, but were shared by the courts as well.

As early as September 30, 1938, only two weeks after the Federal Rules of Civil Procedure became effective,[27] the United States District Court for Massachusetts stated that the rules had been framed for the purpose of helping to "secure the just, speedy, and inexpensive determination of every action, and [assuring] that cases might be settled on their merits . . . ."[28] Since 1938, the courts of many jurisdictions have adopted similar views. The Supreme Court of Illinois, for example, has declared that one of modern discovery's primary purposes is to reduce the power of doctrines that, in the past, "unduly emphasized the adversary quality of litigation . . . ."[29] The California Supreme Court sounded a similar theme when it insisted that the rules of discovery were intended to "take the 'game' element out of trial preparation" and "to do away with the sporting theory of litigation—namely, surprise at trial . . . ."[30] The court observed that while discovery procedures contemplated "retaining the adversary nature of the trial itself," they were designed to make that trial "more a fair contest with the basic issues disclosed to the fullest possible extent."[31]

Thus, according to both the intentions of the framers and the interpretations of the courts, the primary purpose of the modern rules of discovery was to secure complete disclosure of all relevant evidentiary information and to do so by altering the nature of the relationship between the parties during the trial preparation period. While even the most utopian of the reformers could not have expected to root out all vestiges of adversary behavior during this stage of a civil dispute, it seems fair to infer that both the framers and the courts expected litigators to undertake a more elevated, less competitive, and less self-protective stylistic approach during discovery. The unarticulated premise that seems to underlie much of the work of discovery's most vocal proponents is that the process of gathering, organizing, and sharing evidentiary information should take place in an essentially nonadversarial context.

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[25] *The Elimination of Surprise*, *supra* note 15, at 577.

[26] W. Glaser, *supra* note 15, at 30.

[27] A. Holtzhoff, *supra* note 22, at 6.

[28] Nichols v. Sanborn Co., 24 F. Supp. 908, 910 (D. Mass. 1938).

[29] Krupp v. Chicago Transit Auth., 8 Ill. 2d 37, 41, 132 N.E.2d 532, 535 (1956).

[30] Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 376, 364 P.2d 266, 275, 15 Cal. Rptr. 90, 99 (1961).

[31] *Id. See also* United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958).

While disclosing the data needed to ascertain the truth was clearly the paramount objective of the discovery process, its proponents expected discovery to promote other ends as well. Perhaps the most important of these goals was "the realization of just settlements without the necessity of protracted litigation . . . ."[32] The theory was that if opposing parties and counsel knew before trial what the evidence would be with respect to all important issues, they would feel capable of predicting reasonably the outcome of the litigation. Therefore, the parties would decide to settle their dispute in order to avoid the expense, inconvenience, and risk of the trial itself.[33] The crucial premise on which this theory rests is that discovery would result in full disclosure of the relevant evidence. If disclosure was only partial, or if there was reason to fear it was only partial, opposing parties and counsel would either miscalculate the strength of their positions or feel incapable of predicting reasonably what the outcome at trial would be. Although at least one commentator has suggested that greater uncertainty about the outcome would increase the parties' interest in settlement,[34] the proponents of broad discovery have clearly rejected that view and have concluded that a realistic assessment of the likelihood of success generally will be a much stronger inducement to settle than would be fear of the unknown.[35] This conclusion is supported by the obvious fact that fear is not the only response to uncertainty; lack of information also can provoke an interest in gambling. While uncertainty may intimidate some litigants into settlement, it will inspire others to gamble for victory.

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[32] Monier v. Chamberlain, 35 Ill. 2d 351, 359, 221 N.E.2d 410, 416 (1966). *See also* People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 239, 145 N.E.2d 588, 593 (1957); Watson, *The Settlement Theory of Discovery*, 55 ILL. B.J. 480 (1967).

[33] W. GLASER, *supra* note 15, at 11-12; MOORE & FRIEDMAN, *supra* note 15, § 26.01, at 2444; Speck, *supra* note 15, at 1132.

[34] Watson, *supra* note 32, at 489, 490. *See also* Frank, *Pretrial Conferences and Discovery—Disclosure or Surprise?*, 1965 INS. L.J. 661.

[35] W. GLASER, *supra* note 15, at 91 & n.4.

Regardless of the outcome of this debate about the psychology of settlement, there is an overriding policy consideration in this area that commands full disclosure. Discovery was not intended to promote settlements of all kinds. It was intended instead to promote only "just" settlements. Partial, highly manipulated disclosure can provide no assurance that the settlements it generates will be just. That assurance can arise only in the context of full disclosure.

Proponents of discovery have identified an additional purpose they expect discovery to serve. By making all the potential unprivileged evidence available to both sides well in advance of trial, discovery predictably would shorten and streamline the trial process by narrowing the issues and organizing the "mass of undigested and undifferentiated data"[36] into an orderly package for efficient and meaningful presentation.[37] These improvements simultaneously would promote the ascertainment of truth and the conservation of the resources of both litigants and the courts. Thus it was expected that discovery would contribute significantly to the protection of ever-precious judicial resources both by encouraging settlement and by making trials more efficient.

III. ADVERSARY INSTINCTS AND THE UNDOING OF THE NONADVERSARIAL ASSUMPTION

The academic and judicial proponents of the modern rules of discovery apparently failed to appreciate how tenaciously litigators would hold to their adversarial ways and the magnitude of the antagonism between the principal purpose of discovery (the ascertainment of truth through disclosure) and the protective and competitive instincts that dominate adversary litigation. Neither the architects of the discovery machinery nor the judges who embraced their work would have endorsed the central premise of this essay: that adversary pressures and competitive economic impulses inevitably work to impair significantly, if not to frustrate completely, the attainment of the discovery system's primary objectives.

As previously noted, the unarticulated assumption underlying the modern discovery reform movement was that the gathering and sharing of evidentiary information should (and would) take place in an essentially nonadversarial environment. That assumption was not well made. Instead of reducing the sway of adversary forces in litigation and confining them to the trial stage, discovery has greatly expanded the arenas in which those forces can operate. It also has provided attorneys with new weapons, devices, and incentives for the adversary gamesmanship that discovery was designed to curtail. Rather than discourage "the sporting or game theory of justice,"[38] discovery has expanded both the scope and the complexity of the sport. Modern discovery also has removed most of the decisive plays from the scrutiny of the court. Because so many civil cases are settled before trial and because the conduct of attorneys is subject only to fitful and superficial judicial review during the discovery stage, much of the decisive gamesmanship of modern litigation takes place in private settings.

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[36] Kaufman, *supra* note 11, at 125.

[37] *Id. See also* Hickman v. Taylor, 329 U.S. 495, 501 (1947); MOORE & FRIEDMAN, *supra* note 15, § 26.01, at 2442-45; *Instruments*, *supra* note 15, at 205-06; Pike & Willis, *supra* note 15, at 1459; *Discovery Before Trial*, *supra* note 15, at 737-39.

Such factors as traditional professional loyalties, deeply ingrained lawyering instincts, and competitive economic pressures assured that the process of gathering and organizing evidence would not take place in an essentially nonadversarial context. Escape from this outcome would have required substantial changes in the institutional context within which discovery is conducted. However, no such changes have been made. Attorneys conducting discovery still are commanded by the rules of professional responsibility[39] and by their own economic self-interest to commit their highest loyalty to their clients' best interests. By contrast, there is generally no ethical pressure or financial incentive for attorneys voluntarily to disclose the fruits of their investigations or in any way make ascertainment of the truth easier for opposing counsel or the trier of fact. In short, all the well-established institutional pressures that for generations have operated to make attorneys partisan advocates and to make them view each other as committed adversaries have remained intact. In this context, it is indeed naive to expect that discovery, armed only with its own executional rules, could somehow resist the inroads of the adversarial and competitive pressures that dominate its surroundings.

One of the principal aims of this essay is to demonstrate how these same professional and economic institutional pressures are responsible for frustrating to a significant extent the accomplishment of the principal purposes of discovery. The following sections describe the manner in which adversarial pressures and the tactics they encourage systematically operate to limit and distort the flow of evidentiary information to parties and the trier of fact and contribute significantly to the increased cost of litigation.

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[38] Griswold, *The Long View*, 51 A.B.A.J. 1017, 1021 (1965).

[39] Canon 7 of the *Code of Professional Responsibility* mandates that a lawyer should "represent his client zealously within the bounds of the law." ABA Code of Professional Responsibility and Code of Judicial Conduct (as amended Aug. 1977) [hereinafter cited as ABA Code}. This duty is owed simultaneously to the client and to the legal system.

IV. PRIOR STUDIES AND NOTES ON METHODS

There is no consensus in the professional literature regarding whether discovery is achieving the purposes for which it was intended, or the effect of the adversary process upon discovery. The literature focusing on discovery, most of which is impressionistic or meagerly empirical, is replete with inconsistent perspectives and contradictory assessments.[40] The only large-scale empirical effort to evaluate discovery in operation was conducted in the early 1960's and resulted in two monographs: William Glaser's *Pretrial Discovery and the Adversary System*,[41] and the Columbia University School of Law's *Field Survey of Federal Pretrial Discovery*.[42] The *Field Survey* included no direct and systematic effort to evaluate the impact of adversary and competitive economic pressures on the attainment of discovery's principal purposes. It did attempt to determine, however, the extent to which discovery procedures were having the salutary effects their proponents had predicted. The managers of the study concluded that their data could not support the propositions that discovery increased the likelihood of settlement (no effort was made to determine whether the settlements that followed discovery were "just") or that it narrowed issues or otherwise streamlined and shortened trials.[43] The study did lead its managers to conclude, however, that more relevant evidence tended to be made available to counsel (but not necessarily to the trier of fact) in cases in which discovery was used than in cases in which there was no discovery.[44] This hardly surprising conclusion misses the target of my concern, which is not whether a system with adversary discovery is preferable to a system with no discovery at all, but whether "nonadversary" discovery would better accomplish the function of gathering and sharing evidence than does the current adversary procedure.

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[40] Probably the best resource for locating many of the articles and monographs on this subject is the extensive footnoting of William Glaser's *Pretrial Discovery and the Adversary System*. For example, the notes on pages 6, 8, 35-37, 120-23, and 130 of that work are particularly helpful. Two earlier pieces that also contain extensive references to the literature in this area are *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961) and Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132 (1951). Two interesting articles that are relevant to this topic but not referenced in the works cited above are Griffin, *Discovery: A Criticism of the Practice*, 1 FORUM 11 (July 1966) and Comment, *The Decline and Fall of Sanctions in California Discovery: Time to Modernize California Code of Civil Procedure Section 2034*, 9 U.S.F. L. REV. 360 (1974).

[41] W. GLASER, *supra* note 15.

[42] COLUMBIA UNIVERSITY SCHOOL OF LAW PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY (1965) [hereinafter cited as FIELD SURVEY].

[43] W. GLASER, *supra* note 15, at 91-111, 114-16, 200; FIELD SURVEY, *supra* note 42, at I-20, II-6 to II-9.

[44] W. GLASER, *supra* note 15, at 83-87, 105, 114-16; FIELD SURVEY, *supra* note 42, at I-7, I-19, III-27, X-1 to X-6.

The two monographs based on the 1962-1963 Columbia *Field Survey* merit attention because they articulate some general conclusions that are quite inconsistent with my analysis. The authors of these monographs were, in general, more confident than I am about the overall operation of the discovery system. They concluded, for example, that the costs of discovery, at least in smaller cases, were not unreasonable, and that the system as a whole was not unduly burdened with obstructive, uncooperative, or harassing tactics.[45] The *Field Survey*'s data base and the quality of the inferential processes that were applied to it in reaching these conclusions, however, do not seem reliable. While a thorough and systematic effort to analyze the quality of the *Field Survey*'s support for these conclusions is beyond the scope of this essay, a few of its problems and limitations should be pointed out.

The *Field Survey*'s authors initially concluded that the "actual burdens of responding to discovery in terms of effort, time and money for lawyers and their clients appear well tolerated, judging by the great mass of attorneys' reactions."[46] The qualifying phrase at the end of the passage suggests one important reason for viewing with skepticism the *Field Survey*'s conclusions about the impact of discovery costs. Those conclusions were based primarily on information supplied by lawyers and secondarily on limited materials available from judicial opinions. No opinions of clients, the people who *paid* for the discovery, were solicited.[47] Another reason to be skeptical about the *Field Survey*'s economic analysis is that the size and character of the cases studied may well have skewed the project's results. The *Field Survey*'s tables of statistics suggest that about two-thirds of the cases in the major sample group were personal injury matters.[48] In about 57 percent of these cases less than $10,000 was in issue, and less than $20,000 was in issue in approximately 75 percent of these suits.[49] The fact that the second and much smaller sample group contained larger cases[50] undoubtedly offset this small-case bias in the main group to some degree. Since the *Field Survey*'s results showed that discovery activity, and therefore cost, varied directly with the size and complexity of the cases, however, more reliable findings obviously would have required evaluation of a greater number of cases in which more money was at stake.[51]

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[45] *See* W. GLASER, *supra* note 15, at 160-61, 185-88; FIELD SURVEY, *supra* note 42, at I-19 to I-20, III-41 to III-43, III-50 to III-69.

[46] FIELD SURVEY, *supra* note 42, at I-4.

[47] W. GLASER, *supra* note 15, at 44-49; FIELD SURVEY, *supra* note 42, III-2; Rosenberg, *supra* note 15, at 481, 483.

[48] FIELD SURVEY, *supra* note 42, at VII-7, VII-13.

[49] *Id.* at VII-20.

A final factor that raises doubts about the *Field Survey*'s findings regarding discovery cost is that the cases studied were litigated during the 1962-1963 period, a full 15 years ago. Since 1962 there has been a staggering rate of inflation in all aspects of litigation-related costs, including attorneys fees, transportation, document reproduction, and transcripts of oral depositions. How that inflation has affected the relative cost of litigation is not clear, but my experience strongly suggests that clients increasingly are questioning the cost of dispute resolution. Another explanation for the increased cost of litigation since 1962 is the fear of being sued for malpractice Many experienced attorneys bemoan what they perceive as an explosion in the number of malpractice suits and in the rates of malpractice insurance. This development has increased the cost of litigation in at least two ways. First, attorneys pass along to clients as much of the burden of increased insurance premiums as possible. Moreover, they also pass on the costs of the more thorough work and more careful documentation they feel constrained to perform in order to avoid malpractice liability. Finally, some inferential support for the proposition that cost has become a more serious litigation problem since 1962 derives from the fact that one of the concerns that prompted the appointment of the ABA's Special Committee for the Study of Discovery Abuse was the claim that widespread misuse of discovery is "serving to escalate the cost of litigation."[52]

The second conclusion by the authors of the *Field Survey* that requires some critical attention was that discovery was not widely abused, that its machinery was not employed primarily for tactical or harassment purposes, and that discovery processes were not unduly cluttered with adversarial conflicts.[53] Like the *Field Survey*'s conclusions about cost, the structure of the data base here impairs the reliability of these generalizations. The weighting of that base in favor of the smaller cases in which relatively little discovery took place is especially troublesome in light of the study's finding that discovery generated more conflicts, complaints, harassments, and costs in the larger cases.[54]

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[50] W. GLASER, *supra* note 15, at 47, 49.

[51] *Id.* at 192-202.

[52] *Report of the Special Committee*, *supra* note 6, at ii.

[53] W. GLASER, *supra* note 15, 117-61, 182-87; FIELD SURVEY, *supra* note 42, I-20.

The *Field Survey*'s almost total reliance for its data on inputs from practicing attorneys also raises an important question: do lawyers who have been influenced by the specialized adversarial values of the current system retain sufficient objectivity and sensitivity to perceive subtle abuses of discovery devices? Is the moral vision of most litigators so dominated by the peculiarities of the "professional" ethic that they do not define certain conduct that is designed to conceal evidence or disguise its implications as abusive or objectionable? If attorneys suffer from such professional myopia, relying exclusively on them to determine whether adversarial weapons are being misused may not be wise. It also seems fair to ask whether attorneys responding nonanonymously to questions concerning personal misuse of discovery devices will be completely honest. Moreover, many of the most successful abuses of discovery, such as nondisclosure of arguably privileged, irrelevant, or unsolicited information, probably escape detection by opposing counsel.

There are also less subtle and debatable problems with the *Field Survey*'s methods. One problem relates to the effort to determine whether discovery devices were being used for the "legitimate" purpose of acquiring information rather than for less laudable "tactical" considerations. To answer this question, the primary research tool employed in the *Field Survey* was an interview question which asked about the purposes for conducting "your side's *first* discovery step."[55] The designers of the study insisted that the answer to this question would indicate "at least to some extent" responding counsels' "purposes for conducting discovery in general," even though the study's authors simultaneously conceded that the "purposes behind the first step seemed from the data less likely to reflect particular tactical circumstances . . . ."[56] In addition, the responses by the interviewees were confined to a preselected group of nineteen specific alternatives, only seven of which were considered "tactical." More importantly, this group of seven alternatives did not include such obvious tactical purposes as "fishing," burdening opponents' resources (time and money), or trying to build a favorable record for settlement leverage.[57] In this context, the frequency with which tactical purposes were admitted seems striking:

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[54] W. Glaser, *supra* note 15, at 197-202.

[55] Field Survey, *supra* note 42, at III-34 (emphasis added).

[56] *Id.*

[57] W. Glaser, *supra* note 15, at 279; Field Survey, *supra* note 42, at III-35, III-37, VII-31 to VII-36.

50 percent of the respondents declared that freezing an adversary's story was a very important purpose of their first step in discovery; 37 percent made the same admission regarding the purpose of developing weaknesses for use in cross-examination.[58] Even though the question was presented with a built-in bias against strong showings of tactical purposes, two of the five most frequently cited purposes for the *first* discovery step were tactical.[59]

Other aspects of the *Field Survey*'s findings strongly suggest that the quantified results of this structured question substantially understated the extent to which discovery devices were used for tactical purposes and to impair full disclosure. After concluding that the responses to this structured question about the first discovery step showed that the discovery machinery was "in the main used for the rignt reasons,"[60] the authors of the *Field Survey* were compelled to add:

> But analysis of attorneys' free comments or replies to "unstructured" questions in the interview reveals that discovery is more than occasionally used as a costly instrument of warfare and not merely as a means of getting needed information. In many cases burdens of time and money emerged as major considerations. A few attorneys candidly reported that they "had this [adversary] tied up" by discovery. Others said it was "deliberately made as slow and lengthy" as possible. More frequent were complaints that discovery is so costly it is beyond reach for some parties and actually favors wealthy litigants.[61]

Significantly, the most common suggestions attorney-respondents volunteered for improving the rules centered around making the sanctioning machinery more effective.[62] In the concluding paragraph of the section devoted to reporting unstructured inputs, the authors conceded that "the comments do intimate, in a way the machine tables cannot, the vestiges of close to the vest advocacy . . . ."[63]

The intimation that litigators had not abandoned close-to-the-vest tactics was supported by other *Field Survey* findings as well. Even though the authors of the *Field Survey* declared that the "principle of open disclosure appears to command wide approval,"[64] their statistics failed to confirm that the use of discovery reduced surprise or improved the probability that all the relevant evidence would be brought out at trial.[65] Moreover, while the *Field Survey* suggested that discovery promoted some voluntary and informal sharing of information, 65 percent of the responding lawyers stated that in such informal exchanges their opponent was not "unusually candid and open" but instead "disclosed only what he wanted to . . . ."[66] After observing that "for every 100 users of Rule 33 interrogatories, 81 complaints were inspired,"[67] the authors proceeded to report that "an astonishing 42 percent of those who served interrogatories complained that they were answered 'evasively' and 39 percent that the answers were tardy."[68] Finally, the statistics showed that in "61 out of every 100 cases in which discovery was used at least one side had a discovery complaint against the other side."[69] It is not at all clear how the authors of the reports based on the *Field Survey* reconciled these findings with their general conclusion that discovery was working well and that its use was not significantly impeded by the noxious debris of adversary activity.

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[58] FIELD SURVEY, *supra* note 42, at III-36 to III-37.

[59] *Id.*

[60] *Id.* at III-41. *See also id.* at VI-1 to VI-3.

[61] *Id.* at III-41.

[62] *Id.* at VI-6.

[63] *Id.* at VI-7.

[64] *Id.* at X-1.

A more sophisticated and current empirical evaluation of discovery is in order. Indeed, one of the purposes of this essay is to encourage such a project by delineating the structure of the pressures and incentives that shape discovery practice and by demonstrating how these factors inevitably lead to significant abuse of the discovery process and frustration of its primary purposes. My approach in this essay will be primarily qualitative and psychological. My generalizations are based in part on the research reflected in the footnotes, but primarily on my experience as a litigator in a moderate sized (25 lawyers) urban firm, together with observations of and conversations with other, more experienced attorneys. Like most generalizations, those that appear herein certainly admit to numerous exceptions. Not all attorneys experience the pressures I describe in the ways I suggest; nor do all litigators employ all the tactics I discuss. Since most of my exposure to litigation has been in urban San Francisco, with cases of moderate size involving claims ranging from $20,000 to $500,000, I cannot guarantee that my generalizations are applicable to rural settings or to smaller scale cases. Social pressures within the legal and lay communities in less populous settings may limit the excesses to which freewheeling adversary instincts may otherwise arise. Similarly, the economic constraints of small case litigation may leave no room for extensive tactical maneuvering. This concession is not as broad as it might seem, however, because a substantial percentage of the total volume of discovery is conducted in the larger, more complex cases traditionally associated with more populous areas.[70]

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[65] *Id.* at X-2.

[66] *Id.* at X-13.

[67] *Id.* at I-12.

[68] *Id.* at I-13. *See also id.* at III-61.

[69] *Id.* at III-52. *See also id.* at I-9.

V. DISCOVERY'S PSYCHOLOGICAL AND INSTITUTIONAL ENVIRONMENT

An appropriate way to begin an examination of the psychological and institutional environment within which discovery is conducted is by identifying the goals that motivate the attorneys who use discovery procedures. The process of identifying those goals must begin with acknowledgment of one controlling fact: attorneys who use discovery procedures are attorneys engaged in litigation. Discovery is a tool whose purposes are fixed by the purposes of the larger process of which it is a part. That larger process is litigation. Attorneys in litigation have five primary objectives: (1) to win; (2) to make money; (3) to avoid being sued for malpractice; (4) to earn the admiration of the professional community; and (5) to develop self-esteem for the quality of their performances. These objectives are not born simply of cynicism and selfishness. They are institutionalized commands that emanate from a system of combat within a competitive economic structure. It is not difficult to perceive that these goals make the purposes of discovery for individual litigators quite different from the purposes which the architects of the discovery system contemplated.

The pursuit of victory psychologically dominates all other objectives of litigation. Judge Frankel succinctly observed that "[t]he business of the advocate, simply stated, is to win if possible without violating the law."[71] This preoccupation with winning is not simply a product of competitive instincts or self-selected personality traits; it cannot be dismissed as a peculiarity that is congenital to the personalities of the kinds of people who become litigators. It is, rather, compelled by professional prescriptions and reinforced by strong economic pressures and incentives. The rules of professional responsibility, for example, impose no direct obligation on counsel to pursue the truth or voluntarily to disclose information that might help establish the truth.[72] Instead, these rules command the advocate to vest his primary loyalty in his client, to resolve all litigation doubts in the client's favor, and to pursue as vigorously as possible the client's best interests.[73] These commandments of fealty to client and the absence of ethical directives to make full disclosures or to pursue justice result in a professional ethic that compels advocates to pursue the best resolution possible for their clients without regard to the merits of the dispute. To act otherwise is to court professional and economic disaster.

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[70] *See* W. GLASER, *supra* note 15, at 78-82, 176, 201-02.

[71] Frankel, *supra* note 1, at 1037.

[72] *Id.* at 1038.

[73] ABA CODE, *supra* note 39, Canon 7, EC 7-1 to EC 7-4, EC 7-7, EC 7-19.

Litigators who disclose relevant but damaging information about their clients, without being required to do so, run a substantial risk of being sued for malpractice and of being disciplined by their profession.[74] The legal community has made it clear that it is a breach of professional responsibility for a litigator to elevate full disclosure above partisan interests by revealing, unless clearly compelled to do so, probative evidence that is damaging to the client. Strong professional sanctions can be imposed against litigators who follow such a course. Marketplace economics further reinforce these pressures. The system rewards winners. Clients pay counsel not to uncover and divulge all the evidence, but to get the best possible monetary result. To survive in a competitive market that measures success primarily in terms of how much money was earned or saved for the client, litigators must do whatever is necessary and not clearly proscribed to get their clients the best deal. Since lawyers have no economic or competitive incentive to pursue the truth as such, and since clients have no incentive to pressure their attorneys to disclose all relevant information, full disclosure becomes a luxury few lawyers can afford to pursue.

Nor does the desire to secure the admiration of other attorneys or to develop professional self-esteem induce litigators to pursue the truth. The litigation community too often measures success not by the fairness of a result, but by how much more was achieved for the client than other attorneys might have secured under the same circumstances. If litigators secured nothing more for their client than what disclosure of all the evidence would show the client deserved, their professional achievement would likely be described only in the negative. In order for trial lawyers to believe that they have made a positive contribution to their client's position, they must feel that through the exercise of their professional skills, their client has emerged from the trial process better off than the mere facts would have warranted. These considerations tend to make professional self-esteem and the admiration of colleagues turn not so much on success in establishing the truth as on using adversarial skills to get more for the client than he would be entitled to if all the evidence were produced and impartially evaluated.

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[74] *Id.* Canon 4, EC 4-1 to EC 4-6, DR 4-101.

In sum, adversary litigation and competitive economics offer no institutionalized rewards for disclosure of potentially relevant data. They instead offer many institutional deterrents to full disclosure. Review of the primary means by which litigators seek to earn the rewards of the legal system graphically illustrates this generalization. Litigators generally believe they will win the primary forms of recognition our system offers not through full disclosure, not through relentless efforts to secure just results, not through honesty, openness, and uncalculating cooperation, nor even necessarily through efficiency and superior work quality, but rather by tailoring the most clever package of tactics and stratagems to fit the needs of a given case.

The means employed by litigators to achieve victory for their clients regularly involve manipulating people and the flow of information in order to present their clients' positions as persuasively and favorably as possible.[75] This manipulation may involve any or all of the following general techniques: *not disclosing* evidence that could be damaging to the client or helpful to an opposing party; *not disclosing* persuasive legal precedents that could be damaging to the client;[76] *undermining* or deflating persuasive evidence and precedents that are damaging to the client and are introduced by opposing counsel, by such means as upsetting or discrediting honest and reliable witnesses or by burying adverse evidence under mounds of obfuscating evidentiary debris; *overemphasizing* and presenting out of context evidence and precedents that appear favorable to the client; *pressuring* or cajoling witnesses, jurors, and judges into adopting views that support the client's position; *deceiving* opposing counsel and parties about the weaknesses of the client's case and the strengths of opposing cases; *aggravating and exploiting* to the fullest extent possible vulnerabilities of the opposing party and counsel that have nothing to do with the merits of a given dispute by such means as intimidating an anxious opponent, spending a poor opponent into submission, or "soaking" in settlement an opponent who has public image problems or who for other reasons cannot endure the risk and public exposure of a trial. None of these techniques is illegal or violates the letter of the ethical rules of the profession. Indeed, the refusal to resort to at least some of these devices may be construed as a breach of an attorney's obligation "to represent his client zealously within the bounds of the law."[77]

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[75] *See* Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEGAL PROFESSION 107 (1978).

[76] ABA CODE, *supra* note 39, EC 7-23.

[77] *Id.* EC 7-1.

Unfortunately, many attorneys believe that these tactics and stratagems that obstruct and distort the flow of relevant information are most likely to secure the best result for their clients and to provide the most money for themselves. Lawyers are creatures of the economic system within which they must compete for financial rewards and security. Following the classic capitalist paradigm, their economic goal is to make the difference between their income and the resources they expend as great as possible. There are two principal means to this end. One is to have the largest possible number of clients. Since conventional economic wisdom supports the view that "results" are what attract large numbers of clients, the litigator's inclination is to employ those tactics and stratagems that will produce the best results. Moreover, corporate and other business clients tend to measure results almost exclusively in economic terms. From the perspective of such clients, the best outcome an attorney can achieve is one in which the client's judgment or settlement exceeds by as much as possible its payment of attorney's fees. The pressure exerted by such a client on its lawyer will not be to establish the truth or to uncover all the evidence, but rather to win as much or to lose as little as possible. Thus both the lawyer's own sensitivity to competitive economic pressures and the client's definition of results reinforce the lawyer's interest in victory and dilute whatever interest there may be in achieving resolution on the merits.

Pressure from clients to cut litigation costs probably is not sufficient to discourage attorneys from resorting to expensive, obfuscating tactical devices that seem to promise a competitive advantage. There are several reasons such economic pressure from clients will remain largely ineffective as a means of controlling litigation costs and discouraging adversarial manuevering during discovery. One is the ever-present and increasingly intense fear of malpractice. A litigator simply cannot afford to risk full disclosure and efficient exchange of information if other more cumbersome and costly methods will improve the likelihood of a favorable result.

Moreover, sophisticated obstructionist maneuvering during discovery, which is difficult to monitor and evaluate, can be very lucrative for lawyers. Since discovery constitutes such a significant percentage of most litigation activity,[78] lawyers understand that they must make money during discovery. For the lawyer being paid by the hour, there is a great economic temptation to protract and complicate discovery. Most clients, furthermore, are completely incapable of determining which tactical ploys by attorneys are wise and justified and which are simply ways to increase the attorney's fee. Since most clients do not have the ability to evaluate individual maneuvers by attorneys, or the opportunity to compare different legal products, the controls over the marketplace that consumer pressures are supposed to exert must largely fail. Thus litigators remain relatively free of traditional market constraints when deciding how to approach discovery problems. It is quite likely that attorneys will select those costly and obstructionist devices which simultaneously seem to promise them the most profit, the least risk of malpractice, and the greatest probability of victory. As the following detailed discussion of discovery devices will show, these two powerful incentives at work in litigation—the desire to win and to make as much money as possible—conspire against full disclosure far too regularly to justify any confidence that the structure of our civil litigation system will provide a fair and efficient framework for conflict resolution.

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[78] Even the *Field Survey*, conducted 15 years ago with a data sample that was weighted in favor of smaller cases, concluded that discovery consumed a significant percentage of all litigation resources and that the percentage tended to increase in direct proportion to the size and complexity of the case. W. GLASER, *supra* note 15, at 179, 191-97, 201-02.

VI. THE USE OF SPECIFIC DISCOVERY TOOLS TO LIMIT AND DISTORT THE FLOW OF INFORMATION

In this section I will discuss how attorneys, responding to the adversarial and economic pressures discussed above, can use specific discovery tools to limit and distort the flow of relevant data to their opponents and to the trier of fact, to increase the cost of gathering and organizing that data, and to reduce the likelihood that settlements or judgments after trial will be just. My goal, in short, is to illustrate the various ways contemporary adversarial discovery practices can defeat the principal purposes for which discovery was designed.

A. *The Investigation Stage*

The first major component of the pretrial process of gathering and organizing evidentiary data consists of private investigations by counsel. The conduct of such investigations generally is not governed by the formal rules of discovery. Nonetheless, the character and quality of discovery depends so much on the investigative processes that precede and parallel it that discovery cannot be intelligently evaluated without examining these processes. Litigators shape the strategy and tactics of their discovery on the basis of their investigations.

One primary purpose of investigation is to form a preliminary evaluation of the strengths and weaknesses of the client's case. The criteria applied by counsel during such evaluations have little to do with truth and justice. Counsel generally are less concerned about the merits of the case, per se, than they are about such factors as the discoverability, admissibility, and persuasiveness of the evidence; the political, psychological, and economic resources available; the vulnerabilities of the parties and their attorneys; and the potential extent of damages. Of the many factors involved in a preliminary evaluation that can affect discovery, the one with perhaps the most far-reaching implications is the attorney's conclusion regarding whether the case will be settled before trial. The strategy and tactics of discovery that are appropriate for such a case can be quite different from those that are appropriate for a matter that is likely to go to trial.[79]

Counsel's conclusions about the likelihood of settlement may determine which of two different tactical approaches will dominate their discovery plans and decisions. Discovery whose clear purpose is to prepare for trial should be designed to identify and evaluate all the data that the trier of fact might consider. During trial discovery, counsel seek to uncover and confront in intricate detail the full scope of their opponent's case. The litigators' discovery goals in this context are to reduce to an absolute minimum the chances of being surprised during trial and to prepare themselves to rebut and undermine their opponent's evidence. Counsel have no interest in disclosing any more than they must about their client's case, but their objective vis-à-vis their opponent is full disclosure.

The objectives of litigators during the kind of discovery that is oriented toward settlement are strikingly different. Settlement discovery is essentially a process of record building. It is a private trial without judge, jury, or the rules of evidence. Counsel's goal is to build in their opponent's mind the most favorable impression possible of their client's case in order to secure the best settlement. To build this favorable impression, counsel will attempt to manipulate the flow of information about both sides of the dispute. Litigators in this situation are not interested in openly exploring the strength of the evidence against their client. Instead, they will attempt to avoid devices that might alert their opponent to the existence of such evidence. Settlement discovery is designed to emphasize all the data that is favorable to counsel's client and to undermine the credibility and create doubts about the admissibility of the evidence that supports the opposing party. In short, the primary purpose of such discovery efforts is not education but persuasion. That the purposes of settlement discovery are so inconsistent with the purposes that the architects of discovery envisioned is especially significant since a vast majority of civil lawsuits are settled before trial.[80] Since it is well known in the legal community that most civil cases are settled, there is a strong probability that most counsel will formulate discovery strategies that are largely tailored for settlement rather than trial objectives.

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[79] This is true even though inability to predict settlement as a certainty usually compels litigators to do some discovery that is specifically tailored to trial preparation.

Litigators' preoccupation with persuasion also can affect the way they respond to discovery questions directed at their clients. Unlike the attorney who assumes the case will go to trial, lawyers who assume their cases will end in settlement are not necessarily interested in preventing disclosure of all the evidence about their client's position. Instead, they may selectively disclose evidence that makes their client's case seem stronger. Since their goal is to formulate in their opponent's mind as positive an impression of their client's position as possible, they will not feel any incentive to disclose voluntarily information that might weaken that impression. If anything, their instinct to hide incriminating evidence as long as possible will be reinforced by their record-building purposes.

One function of investigation, then, is to gather the information that is necessary to define the strategic purposes of, and the tactical means for, manipulating the flow of information during discovery or trial. Toward that end, investigating litigators must identify all the evidence that is favorable to their clients and determine how to use this material. If, for example, an attorney has concluded that a matter is likely to go to trial and, thereafter, interviews witnesses who have favorable testimony to offer, he probably will take statements from them but will not notice their depositions. The lawyer will disclose the witnesses' identity only if clearly compelled to do so and will hope to surprise his opponent with this testimony at trial. By contrast, a litigator engaged in settlement discovery probably would take statements from such witnesses and notice their depositions as part of his record-building strategy. The litigator's treatment of any favorable documents and other tangible evidence that his investigation uncovered would follow a similar pattern. If a trial is foreseeable the lawyer will try to save these materials for surprise, but if settlement is likely his goal will be to decide how and when to present the favorable evidence so as to maximize its dramatic impact on opposing counsel and parties.

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[80] FIELD SURVEY, *supra* note 42, at III-3 to III-4, III-10 to III-11; Clark & Moore, *A New Federal Civil Procedure* (pt. 2), 44 YALE L.J. 1291, 1294 (1935); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 35 & nn.14 & 15 (1972); Rosenberg, *supra* note 15, at 488-89.

The investigating litigator is also concerned about identifying and deciding what to do with evidence that is damaging to his client. Unlike favorable evidence, there is rarely any reason voluntarily to disclose damaging information.[81] When deciding what to do with damaging evidence, therefore, counsel's primary objective is to devise means to reduce the likelihood that the evidence will be discovered. The litigator, for example, may begin preparing his client to interpret narrowly all inquiries that seem directed toward sensitive material and to guard aggressively against providing any more information during discovery than is clearly and properly demanded.

If investigation results in locating a nonparty witness whose testimony would be damaging, one of counsel's first efforts will be to ascertain the likelihood that the witness will be discovered by the opponent and will testify at trial. If there is a real chance that the damaging witness will not be discovered by the opposition, counsel probably will take a statement, for possible use in impeachment and in preparation of other witnesses, and will hope the opponent never learns about the witness or his testimony. If it is likely that the opposing attorney will discover the witness, the investigating lawyer will take a detailed statement and will conduct an aggressive search for ways to assault the witness' credibility and to counter his testimony. If the investigating attorney assumes the case will be settled, he will not notice the deposition of the hostile witness and will attempt to negotiate the settlement before the opponent learns about the damaging testimony. If the matter appears likely to go to trial, however, and the witness will probably be called, the investigating attorney will notice the witness' deposition and will use it to explore fully not only the damaging testimony but also ways to influence, impeach, intimidate, confuse, pressure, disarm, and deflate the witness.

Counsel's responses to damaging documents and other tangible evidence uncovered during private investigations will follow a similar pattern. If possible, the attorneys will try to acquire control over the evidence and to prevent their opponents from discovering it. In addition to attempts to mislead opposing counsel by creating false, diversionary leads and generating obfuscating clouds of irrelevant information, there are several more clearly ethical devices available for use in concealing damaging evidence.

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[81] Exceptions to this generalization sometimes arise when an attorney is seeking credibility during settlement negotiations or attempting to deflate the impact of adverse information he knows opposing counsel has discovered. Sometimes in such circumstances tactics suggest admitting some of a client's problems. The pursuit of settlement credibility and efforts to steal an opponent's thunder, however, rarely (if ever) inspire competent counsel voluntarily to disclose their clients' greatest vulnerabilities or more inculpating evidence than they have reason to believe their opponent is likely to discover anyway.

If counsel's private investigation reveals that their client has major and potentially discoverable problems, they not only must fashion a strategy to reduce the chances of those problems being discovered, but also must consider ways to terminate the litigation before the severity of those problems makes escape by their client very expensive. One tactical approach to this problem is to initiate discovery that is designed to evaluate the resources and psychological staying power of opposing parties and their counsel. If the investigating lawyer discovers a vulnerability, he will feel considerable pressure to exploit it for the purpose of establishing an early, favorable settlement. He may consider, for example, trying to smother a relatively impecunious adversary with extensive discovery costs. Another strategy employed by litigators whose clients have serious problems is to focus intensive early discovery efforts on reducing the size of, or undermining the evidentiary support for, the opposition's damage claims. If counsel can use aggressive discovery to create doubts in an opponent's mind about the strength of his damage claims, they may be able to orchestrate a settlement before their opponent discovers the full extent of their client's difficulties.

Investigation that is dominated by adversarial objectives generates at least two kinds of substantial costs—costs that might be greatly reduced under an alternative system of discovery. One is the cost to justice. The principal purpose of the present system of adversarial investigation is not to ascertain the truth, but to establish the informational basis for strategies to control the flow of relevant data and to secure the best settlement. In short, adversarial investigation, accompanied as it is with no compulsion to disclose voluntarily its results, enables counsel to play the games of deception, concealment, and manipulation that defeat the purposes discovery was intended to serve. The second major cost of adversarial investigation is economic. An investigation with the simple purpose of identifying and organizing all potentially relevant data would be substantially less expensive than an investigation in which that purpose is accompanied by the present adversarial objectives. The significant amount of time currently committed by lawyers to strategizing about how to structure and manipulate the flow of testimonial and tangible evidence substantially increases the cost of dispute resolution.

B. The Formal Discovery Stage

The informal, private investigation stage is followed in the typical civil law suit by formal, "public" discovery. An analysis of the impact of adversary pressures on the use of each principal tool of formal discovery reveals how these tools are used to limit and distort the flow of information to opponents and to increase the cost of litigation.

(1) Interrogatories and Document Productions

Written interrogatories frequently are the first discovery device used by counsel. According to the attorneys who responded to a recent questionnaire by the Litigation Section's Special Committee for the Study of Discovery Abuse, written interrogatories also result in more abuse than any other discovery tool.[82] Such abuse takes place both in propounding and in answering interrogatories.

Attorneys drafting interrogatories do not view them primarily as a means of openly exploring the data that is relevant to a given dispute. Rather, attorneys perceive interrogatories in the same manner they perceive other litigation procedures—as weapons to be used in the manner that best advances the competitive interests of their client. Since attorneys tailor the way they use interrogatories to fit particular adversarial and economic purposes, and since those purposes rarely include the exposition of the truth, there is little institutionalized assurance that the use of interrogatories will result in the disclosure of all the data that is relevant to a dispute. Specific examples are in order at this point.

In settlement discovery, sophisticated counsel draft interrogatories, requests for production of documents, and requests for admissions that are calculated to build a record that is most favorable to their client. They are careful not to frame questions that will encourage their opponent to investigate in areas that are likely to yield evidence that is damaging to the propounding counsel's client. Similarly, propounding attorneys will try to avoid questions that will compel their opponent to review the positive aspects of his case or encourage him to do additional analytical thinking or legal research that will improve his preparation. Even in trial-oriented discovery, counsel drafting interrogatories attempt to frame questions that do not reveal their theory of the case, their view of the evidence, their tactical plans, or the aspects of the dispute that cause them the greatest concern. In short, the drafting litigator is constantly under pressure not to initiate discovery that could help educate the opponent. The search process for relevant data is thus circumscribed by the fear that offensive discovery efforts will disclose something new and useful to opponents. This fear distorts the process of information acquisition until settlement is secured.

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[82] *Report of the Special Committee*, *supra* note 6, at 20. That interrogatories have been the most frequently abused discovery tool is confirmed by the findings of the Columbia University *Field Survey*, *supra* note 42, at I-12 and I-13, and in the Advisory Committee's Note to Rule 33 in the *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, in which the Committee observed that "[t]here is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device." 48 F.R.D. 487, 522 (1970) [hereinafter cited as *Proposed Amendments*]. *See also* Speck, *supra* note 15, at 1142-44, 1151; *Developments in the Law—Discovery*, *supra* note 15, at 960, 963-64.

The preceding examples are relatively subtle ways in which adversary pressures distort and complicate what could be a more straightforward and less expensive pursuit of information. It is the less subtle distortions of the process of drafting interrogatories, however, that are most commonly perceived as abuses of the discovery process.[83] That the ABA's Special Committee proposed only one major change in the rules governing the propounding of interrogatories and that this change would consist of limiting to thirty the number of interrogatories which a party may serve without a special showing of need,[84] suggests that the abuse of this discovery tool that most concerns today's bar is the practice of propounding a burdensome number of written questions to party opponents.

Many litigators feel compelled to use written interrogatories as weapons for purely tactical purposes if doing so might promote their client's interests and generate greater fees for themselves. Some attorneys serve lengthy sets of "canned" interrogatories if they perceive some advantage to be gained by psychologically or economically harassing an opposing party or counsel.[85] Litigators also may use interrogatories to pressure or manipulate opposing counsel into doing such initial case preparation as factual investigation and legal research and analysis that properly should be undertaken by the propounding counsel and paid for by that counsel's client. One additional abuse of interrogatories about which lawyers frequently have complained is the "fishing expedition," which involves serving numerous and far-reaching questions, not for the purpose of obtaining information about matters already in dispute, but in order to search for evidence that might support new types of claims, uncover competitors' business secrets, or harass an opponent into a favorable settlement. More than half of the attorneys polled in the Columbia University *Field Survey* "accused their opponents of 'fishing' for a case," provoking the author of the published monograph interpreting the *Field Survey* data to concede that this result seemed "to corroborate the fears of skeptics that sham suits can be filed and then built up by discovery."[86]

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[83] *See* note 82 *supra*. *See also* W. Glaser, *supra* note 15, at 136-37, 149-53.

[84] *Report of the Special Committee*, *supra* note 6, at 18. In its *Preliminary Draft*, the Advisory Committee on Civil Rules recommends against a nationwide imposition of the 30 interrogatory limitation. As an alternative, the Advisory Committee recommends an addition to Rule 33 that explicitly would empower a district court, by action of a majority of its judges, to formulate a local rule that would limit the number of interrogatories that may be used by a party. *Preliminary Draft*, *supra* note 6, at 645-49. Some of the implications of these proposals are explored in Part VII *infra*.

[85] Even though the Columbia University *Field Survey* data suggested that greater use of form interrogatories was not associated with greater numbers of conflicts over discovery, it is clear that lengthy sets of canned interrogatories force respondents to consider many

The costs generated by interrogatories obviously will tend to increase as their purposes proliferate. Clients must pay for the time attorneys spend considering and carrying out various ways to use interrogatories for purposes other than obtaining relevant data. Moreover, canned interrogatories present tempting opportunities for litigators to increase their profit margins. An attorney may charge many different clients the full cost of drafting the original set of questions, even though the use of the set in a given case requires only editing and copying, both of which often can be done by nonlegal personnel. Lengthy, multipurpose interrogatories also force opposing parties to commit extra resources in order to evaluate the objectives of the questions they receive and to tactfully answer or avoid improperly motivated inquiries.

Like interrogatories, requests for documents and for admissions suffer from obvious abuses. Demands for document production, for

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questions that may be wholly irrelevant to matters in dispute in a given case and easily lend themselves to abusive tactical purposes. W. GLASER, *supra* note 15, at 158-60.

[86] *Id.* at 122. In another context, however, Glaser asserted that the data "show that one of the principal fears about discovery [using interrogatories to "fish"] is not being realized." *Id.* at 62. The way Glaser reached this conclusion does not inspire confidence. He chose to bestow more significance on the fact that few of the questioned lawyers would admit they commenced discovery with no purpose in mind than on the high percentage of attorneys who complained that their opponents used discovery for fishing purposes. Why self-serving denials of purposeless activity are entitled to more credibility than complaints about opponents is anything but clear. This inferential procedure is especially disconcerting because the *Field Survey* question designed to establish counsel's purposes for using discovery asked *only* about the *first* discovery step and did not include any reference to "fishing" among the 19 possible answers. *See* FIELD SURVEY, *supra* note 42, at III-36 to III-37. *See also* W. GLASER, *supra* note 15, at 279.

example, can be used to impose great economic burdens upon or to harass or intimidate opposing parties and lawyers, to disrupt normal business operations or professional schedules, to steal trade secrets, or to fish for evidence to support new claims. Moreover, the pressures generated by such abusive tactics can be exploited to coerce a settlement that bears no relation to the merits of the dispute.

The disfunctional effects that adversary pressures have on discovery are even more obvious in the ways litigators respond to interrogatories, demands for documents, and requests for admission. The principal goals of the responding attorney tend to be completely adversarial: to provide as little information as possible, and to make the process of acquiring that information as expensive and difficult as possible for the opposing party and lawyer. To do otherwise might be considered a breach of the ethical obligation owed to a client, thereby exposing counsel to the risk of a malpractice suit. Volunteering information rather than resisting its production may also deprive the litigator of opportunities to demonstrate his adversarial skills and to increase the size of his fee.

There are many standard devices used by litigators to resist the disclosure of information and to mislead the opponent through their responses to interrogatories, requests for admissions, and demands for documents. The responding adversary's first impulse is to construe all inquiries and requests as narrowly as possible, thereby limiting the amount of useful information that must be divulged. The rules of professional responsibility lend important support to responding counsel in such exercises of semantic narrowness. Ethical Consideration 7-3 to Canon 7 of the ABA Code of Professional Responsibility directs litigating attorneys to resolve all "doubts as to the bounds of the law" in favor of their clients.[87] Thus it appears that any ambiguity about the scope of an interrogatory or a document production demand must be resolved in favor of narrowness and against disclosure. Moreover, in the absence of judicial intervention it is the responding attorney who decides what constitutes a doubt. The attorney will feel considerable pressure to adopt an aggressively broad definition of the term "doubt" whenever doing so might benefit the client—by revealing less information or misleading an opponent—or inflate the fee—by necessitating a costly effort to resist a motion to compel.

The narrow reading of inquiries and demands is by no means the only semantic ploy that litigators use to frustrate the discovery efforts of opponents. An aggressive counsel also will refuse to respond to written requests that are not free of virtually all ambiguity, imprecision, overbreadth, irrelevance, or other technical deficiency. Counsel's instinct is to object to the form or substance of any discovery request whenever an objection is arguably reasonable and if failure to respond might secure some competitive or self-serving economic advantage. Here, as elsewhere in litigation, institutional rules and pressures invite counsel to conclude that doubts must be resolved against disclosure, and that opponents must be forced to expend as much of their resources as possible to obtain data favorable to their cause.

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[87] ABA CODE, *supra* note 39, Canon 7, EC 7-3.

Nor will litigators necessarily answer a request even after they have construed it as narrowly as possible and have objected to every arguable technical deficiency. Responding counsel's next line of defense is built on the use of privileges and the work product doctrine. Conscientious litigators will scrutinize every probe from an adversary to determine whether it is directed at material that is arguably shielded from disclosure. Counsel also will evaluate every item of information they feel constrained to divulge to determine whether its disclosure may constitute a waiver of any privilege possibly held by their client.

Counsel can manipulate privileges and the work product doctrine with especially pernicious effects when responding to requests for documents. The first stage of such manipulation may consist of efforts to include as many documents as possible within the arguable scope of some privilege or the work product doctrine. These efforts will be especially intense with regard to documents that could damage a client's position. Next, counsel will omit any reference in their response to documents they have decided might be considered privileged or might fall within the work product doctrine. The lawyers' hope, of course, is that their opponent will either forget to press for information about the withheld documents or will assume the privileges in fact apply. In other words, responding counsel will identify the withheld documents only if their opponent or the court so compels. Moreover, if compelled to identify withheld documents, the information counsel will submit will be as meager as possible. At each stage in what can become a tortuous and very expensive process, resisting counsel hope the opponent will abandon pursuit of the damaging material. It is worth emphasizing that these tactics of resistance fall short of such overtly unethical conduct as destroying or hiding incriminating documents.

When responding to document production demands, litigators sometimes resort to the obstructive device of burying significant documents in mounds of irrelevant or innocuous materials. This practice is sufficiently widespread to have provoked an unusually explicit condemnation in the report by the ABA's Special Committee for the Study of Discovery Abuse. One of the proposed changes in Rule 34 would compel a party responding to a document production request to produce its documents "as they are kept in the usual course of business or . . . [to] organize and label them to correspond with the categories in the request . . . ."[88] In its comments, the Special Committee stated that this proposal is intended to be "responsive to a reprehensible practice much discussed by the Committee—the deliberate attempt by a producing party to burden discovery with volume or disarray."[89] The Committee went on to observe that "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance."[90]

An additional obstructionist purpose can be served by burying crucial documents in mounds of irrelevant material—a massive document production forces opponents to spend a great deal of time and money copying and ferreting through the produced papers. The Special Committee's proposal would help deter only deliberate efforts to disguise and disorganize documents; it would do nothing to curb the massive overproductions that are designed to exert economic pressure on parties making requests. Nor would the proposal reduce the considerable pressure exerted on responding attorneys to find some excuse not to produce any material that might weaken their client's position.

If the tactics discussed above fail to conceal damaging information, counsel may feel constrained to refuse to respond to interrogatories or document production requests until compelled to do so. The first ploy is to ignore the original discovery probe and its deadline. At least among seasoned litigators the fear of sanctions for missing one deadline is not great.[91] If the opposing attorney then presses for a response, the next defensive maneuver is to make excuses, play on sympathies, and seek extensions. When the deadline for the first extension approaches, additional extensions are sought. Such self-conscious and systematic efforts at procrastination impose additional financial strains on opponents, may undermine their will to pursue the litigation, and give the defensive attorney time to negotiate a favorable settlement before the damaging evidence is disclosed.

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[88] *Report of the Special Committee*, *supra* note 6, at 22.

[89] *Id.* Citing the Special Committee's observation that deliberate efforts to impair access to critical documents by mixing them with others apparently are not unusual, the *Preliminary Draft* recommends adoption of the same addition to Rule 34. *Preliminary Draft*, *supra* note 6, at 651.

[90] *Id.*

[91] *See, e.g.*, *Proposed Amendments*, *supra* note 82, at 538-40; W. GLASER, *supra* note 15, at 154-56, 210-11; Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 494-96 (1958); *Developments in the Law—Discovery*, *supra* note 15, at 990-91; Comment, *supra* note 40, at 361, 365-66, 382, 389.

Unfortunately, the economics and tactics of adversary litigation occasionally make calculated, systematic resistance of the kind described above virtually inevitable. Especially in major commercial litigation, the stakes may be so high and the economic benefits to be gained by delay so great that litigators intent on serving the best interests of their clients, will feel compelled to resist discovery by every available ploy short of wilful bad faith. Each day's profit from a legally vulnerable operation, or each day's interest on the money that might be lost in a judgment, could far exceed the cost of counsel's delaying services and any likely sanctions imposed for failing to cooperate fully in discovery.

One recent illustration of the kind of resistance to disclosure of documents that appears to be attributable, at least in part, to the intense pressures that adversary proceedings and high economic stakes can impose on litigators occurred in an antitrust action brought by Berkey Photo, Inc. against the Eastman Kodak Company. This suit, which from the outset carried a threat that some of Kodak's subdivisions might be severed, resulted in an initial monetary judgment against Kodak of almost $113,000,000.[92] The litigation spawned several major battles over discovery, some of which had to be confronted by both the magistrate and the federal district court judge, who was, ironically, the Honorable Marvin E. Frankel.[93]

These relatively predictable struggles over discovery, however, are not what make this case especially instructive. That quality stems from events that came to public light in the closing days of the six-month trial when it was learned then that one of Kodak's attorneys had concealed the existence of a large group of copies of Kodak documents. During the discovery stage of the litigation, counsel for Berkey had deposed one of Kodak's experts, a professor of economics at Yale University. During that deposition the economist disclosed that he had reviewed the copies of the documents in question and, thereafter, had returned them to one of the lawyers representing Kodak. After the expert declared that he could not recall whether he had made any marks or marginal notes on the copies, counsel for Berkey insisted that Kodak produce the documents. The lawyer representing Kodak at the deposition declared that the documents had been destroyed. He reaffirmed that declaration a short time thereafter in a sworn affidavit.

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[92] The trial judge later reduced the initial judgment to approximately $81,000,000. *See* 1978-1 Trade Cas. (CCH) ¶ 62,092; Kiechel, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188; Wall St. J., March 23, 1978, at 5, col. 1.

[93] *See* Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (1977); 1976-1 Trade Cas. (CCH) ¶ 60,832; 1974-1 Trade Cas. (CCH) ¶ 75,021.

Kodak's lawyer was not telling the truth. As he admitted much later during the final days of the trial, first to the senior trial lawyer for the case and then to Judge Frankel, he had known all along that the documents had not been destroyed. When the documents were finally produced they provided Berkey with little or no new information, but the dramatic, eleventh hour revelation that they had been hidden for so long gave Berkey's counsel considerable ammunition for arguments to the jury.[94]

The failure by Kodak's counsel to produce the copies of the Kodak documents until the close of the trial appears to have been primarily responsible for Judge Frankel's declaration on the record that the way Kodak's lawyers had conducted the litigation seemed to reflect "a kind of single-minded interest in winning, winning, winning, without the limited qualification of that attitude that the court, I think, is entitled to expect and which . . . has infected certain aspects of this case from time to time in ways I find upsetting."[95] Judge Frankel referred the matter to the United States Attorney, who has begun an official investigation.[96]

It is unlikely that the will to win, cited by Judge Frankel, or any other single factor is solely responsible for the regrettable conduct by the lawyer representing Kodak. As I have argued above, it is the confluence of so many mutually reinforcing pressures and incentives, all militating against disclosure, that makes the invitation to the kind of errors made in the Kodak case so compelling. One additional indication of the power of these pressures warrants comment: the lawyer who succumbed to them was not a neophyte, more vulnerable because of ignorance and inopportunity to learn to cope, but rather an experienced, fifty-nine year-old full partner in a large and well-respected New York law firm.[97]

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[94] Kiechel, *supra* note 92, at 188, 190-94; Wall St. J., March 30, 1978, at 5, col. 1; *id.* April 11, 1978, at 1, col. 4, 23, col. 1.

[95] Wall St. J., April 11, 1978, at 23, col. 3.

[96] The Kodak attorney recently pleaded guilty to criminal contempt charges that were filed against him by the United States Attorney for the Southern District of New York. He faces a maximum penalty of five years in prison or a fine up to \$10,000. Nat'l L.J., October 2, 1978, at 3, col. 1.

[97] Kiechel, *supra* note 92, at 188; Wall St. J., March 30, 1978, at 5, col. 1.

(2) Depositions

Like the written tools of discovery, oral depositions can be used not only to gather data about events and witnesses but also as adversarial weapons designed to place burdens on opponents and to manipulate the flow of information.[98] The manipulative and competitive purposes for which depositions can be used generally begin evolving during counsel's private investigation into the background of the dispute. It is during this stage of the litigation that the attorney frequently decides who to depose and for what purpose. It is also during this stage that the litigator will begin identifying the persons whom he will try to prevent from being deposed. Such people may include percipient witnesses or, perhaps more frequently, experts who have been retained by parties or lawyers to form opinions about some aspect of a case. The incentive to resist efforts by an opponent to depose experts is especially strong when the experts have reached conclusions that are equivocal or damaging to the party on whose behalf they were retained. Such conclusions are at least occasionally reached, even though some lawyers attempt to manipulate their experts psychologically and to orchestrate the flow of information to the experts in order to maximize the likelihood of receiving favorable opinions.[99]

A very recent California case[100] offers a striking example of resistance by counsel to the taking of depositions of experts who have reached damaging conclusions. The action was for personal injuries that plaintiff alleged were caused by a defective tire-changing machine or by a defective tire. The machine manufacturer's investigator concluded, not surprisingly, that the injury was attributable to a defect in the tire. That defendant consequently designated its investigator as an expert who would testify at trial. Apparently the tire manufacturer's counsel found this expert's probable testimony persuasive and dangerous. After reading the expert's report, counsel for the tire manufacturer entered an agreement with its codefendant that it would indemnify the machine manufacturer for any liability for plaintiff's injuries provided the expert was withdrawn as a witness, the expert's report was withheld from plaintiff's counsel, and plaintiff's attorney was not permitted to depose the expert. In the ensuing litigation plaintiff's counsel sought an order requesting that the expert be made available for deposition. Counsel for the machine manufacturer insisted that because he was professionally obligated to pursue the best interests of his client, he should be permitted to use his expert's opinion in whatever manner seemed most likely to produce the best result at trial for his client. The majority of the justices of the California Supreme Court rejected this argument and concluded that the purported indemnification agreement was an illegal conspiracy among defendants to suppress relevant evidence. After a battle that went through three levels of the judiciary, plaintiff was granted an opportunity to depose the expert.

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[98] *See* 59 YALE L.J. 117 (1949).

[99] *See* Brazil, *supra* note 75, at 110.

[100] Williamson v. Superior Court of Los Angeles, 582 P.2d 126, 148 Cal. Rptr. 39 (1978). For another relatively recent example of attorneys attempting to use the work product doctrine to prevent the deposition of an expert who had formed a potentially very damaging opinion, see Petterson v. Superior Court of Merced County, 39 Cal. App. 3d 267, 114 Cal. Rptr. 20 (1974).

The fact that plaintiff finally succeeded in gaining access to defendant's expert, however, should not obscure the additional basic questions which this case provokes. How frequently are such conspiracies to suppress damaging expert opinions entered? If an expert has not been formally identified as a witness for trial, how can opponents learn that conspiracies to suppress his testimony have been entered? Even if the existence of such a conspiratorial agreement in theory is discoverable, how likely are most litigators to suspect that a conspiracy has been entered and to press for its disclosure?

Such wholesale resistance is, of course, not the only discovery problem associated with depositions. Depositions, like other discovery devices, are expensive[101] and thus can be used to exert economic pressure on opposing parties and counsel. An aggressive litigator bent on straining the resources and testing the will of an adversary can notice numerous depositions and can prolong each examination for extended periods. Because depositions can be used to require the presence of the deponent for lengthy periods of time, they also have great adversarial potential for harassing and embarrassing adverse parties or witnesses and for disrupting their lives and businesses.

These, however, are only the obvious abusive purposes for which depositions can be used. Adversarial pressures also account for more subtle forms of manipulation that can be used to restrict and contort the disclosure of evidence in depositions. The more subtle means, moreover, cannot be policed effectively by the courts.

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[101] The *Report of the Special Committee* noted: "According to the Survey of Court Reporters' Fees printed in *Litigation News* (Oct. 1976), the costs of stenography vary from state to state but range from $10-$150 per hour for attendance and 45¢ to $3 per page of original transcript. Daily copy costs are most often more than double." *Report of the Special Committee, supra* note 6, at 11. These figures, of course, do not include the costs of counsel's or witness' time in preparation for and during the depositions, travel, food, lodging, reproducing documents, and other exhibits for use during depositions, or of other incidental (but not inconsequential) expenses.

One of the most pronounced distortions of the data flow is likely to occur not during pure discovery depositions, which make adversarial sense only when it seems virtually certain that the matter will go to trial, but rather in depositions taken to preserve the testimony of a witness who will not be available for trial or to build a favorable record for leverage in settlement. Attorneys responding to adversarial impulses during the latter types of depositions will not ask open-ended questions covering the whole spectrum of the witness' potential knowledge. These attorneys are not interested in exposing the whole story on the public record. Instead, they will use every device available to develop the deponent's testimony in the direction most favorable to their client. If possible, they will use leading and misleading questions, ingratiation, intimidation, and confusion to develop the story they want. Seeking the same objective, they will limit and obstruct as much as possible—through objections, distractions, intimidations, and whatever other tactics promise success—opposing counsel's efforts to elicit testimony that is unfavorable to their client.

Another tactic employed during settlement-oriented depositions that limits even more severely the ascertainment of truth is the skillful determination of which questions not to ask. Before a deposition is taken, conscientious litigators frequently have identified the key weaknesses of their case from a source to which their opponent is denied access: their client. Armed with what often may be exclusive information about their client's vulnerabilities, litigators will structure their questions so as to avoid those areas of the witness' knowledge that might be damaging and to emphasize testimony that strengthens their client's position. If their efforts result in a transcript that on balance is helpful, they will do nothing to impair the credibility of the witness. If, however, opposing counsel somehow has identified weaknesses or stumbled into damaging areas of testimony, resourceful litigators will do all they can to destroy the credibility of the witness or to camouflage the significance of the testimony. With both sides of a dispute so intent on exposing only what is favorable to their client, and therefore shaping their questions to elicit only selected portions of the evidence, there is no assurance that the depositions will disclose all the potentially relevant information the witness may have. Again, fortuity rather than institutional design is truth's most consistent ally.

Aggressive litigators can also limit and distort the flow of information during discovery through the manner in which they prepare their clients and witnesses to be deposed. The adversarial objective of attorneys whose clients or witnesses are being deposed is to limit to the greatest extent possible the information divulged. To maximize their control over the flow of information from their clients, attorneys may conduct mock depositions in which they pose dangerous questions to their clients and coach them as to the least troublesome answers. Short of such rehearsals, attorneys can instruct their clients in the art of nondisclosure. A recitation of the standard admonitions attorneys give their clients before depositions graphically illustrates how preoccupied litigators can be with resisting disclosure: (1) never volunteer information or help attorneys who are posing questions; (2) ignore the long silences and expectant faces attorneys will use to pressure you into continuing to speak; (3) answer questions with the fewest words and least elaboration that is consistent with self-serving consistency; (4) never interrupt the examining attorney before he has completed a question (to do so might provide an answer to a question the attorney had not thought to ask); (5) never edit or help clarify a confusing question (instead, simply say you do not understand); (6) always pause before answering in order to think and to give your attorney an opportunity to object; and (7) always listen carefully to your attorney's objections because they may contain directives or clues about how to respond to a line of questions. The purpose of such instructions to witnesses obviously is not to ensure that all the relevant information they have will be disclosed during their depositions.

Counsel may use many other devices to regulate and restrict the evidence their client or witness provides during deposition. Counsel can assert privileges whenever they arguably apply and can direct the witness not to answer questions that might invade protected spheres. They also may attempt to pressure the examining attorney into abandoning sensitive areas of inquiry by aggressively interposing disruptive objections to the form or relevance of questions. Counsel even may try to delay indefinitely the taking of their witness' deposition or to manufacture excuses to limit the scope of permissible questions. Such tactics will communicate quickly to an opponent that he will have to work very hard, withstand unpleasant pressures, spend considerable money, and seek aid from the bench if he intends to pursue what may or may not be fruitful lines of inquiry. My point here is not simply that such obstructionist devices are available and employed, but that the intense competitive pressures of the adversary system make resort to them a constant temptation. Indeed, some lawyers might argue that a thoroughgoing adversarial professionalism commands the use of such obstructive devices whenever they appear to promise significant advantages for a client.

VII. PENDING PROPOSALS FOR CHANGE

Concern within the professional community over current discovery practices has inspired the ABA's Special Committee for the Study of Discovery Abuse and the Judicial Conference's Advisory Committee on Civil Rules to suggest several changes in the Federal Rules of Civil Procedure.[102] It seems fair to infer from the nature of the reform proposals contained in the *Report* by the Special Committee and the *Preliminary Draft of Proposed Amendments* by the Advisory Committee that their primary concern was not with the failure of the current rules to assure maximum disclosure of potentially relevant information. Neither the *Report* nor the *Preliminary Draft* acknowledge such a failure. Nor does either document discuss the many adversarial and economic pressures which systematically militate against full disclosure during discovery.

The proposals made by the Special Committee and embraced by the Advisory Committee suggest that both groups are interested primarily in curbing the cost of discovery and reducing the ways discovery can be abused for purposes of harassment and delay. These are important problems. They are not as important, however, as the failure of the current discovery process to accomplish the primary purposes for which discovery was designed: pretrial disclosure to all parties of all nonprivileged relevant evidence and encouragement of just settlements. Moreover, I believe that the abuses that rightfully trouble both committees cannot be reduced significantly without restructuring the professional pressures which in large measure provoke these abuses. Because the *Report* and the *Preliminary Draft* fail to examine the environmental causes of the problems they address, their proposals are incapable of effecting the fundamental reforms that are necessary to ensure that discovery will achieve its essential purposes.

Even more disconcerting is the direction the Special Committee's *Report* takes in proposing its most important changes. Instead of encouraging a more open sharing of evidence and combating the already considerable pressures against disclosure, two of the Special Committee's most important proposals would further limit the acquisition of discoverable information.[103] It appears that the Special

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[102] *See* notes 84 & 89 *supra.*

[103] The Advisory Committee on Civil Rules has not fully embraced either of these two proposals. As discussed in note 84 *supra*, the Advisory Committee does not favor nationwide imposition of a thirty question limitation on the number of interrogatories a party may serve as of right. Instead, it favors conferring a power on district courts to set whatever limits they feel are appropriate. *Preliminary Draft*, *supra* note 6, at 645-49. Nor does the Advisory Committee agree that the term "issues" should replace the phrase "subject matter" in Rule

Committee and, to a lesser extent, the Advisory Committee are seeking to reduce costs and curb abuses at the expense of a wider flow of information between parties and to the trier of fact. This action provides a false economy, however, because it erects additional barriers to the accomplishment of discovery's primary purposes and even may increase the costs of litigation.

Of the changes proposed in its *Report*, the Special Committee believes that the most significant is the rewording of Rule 26 (b)(1), which defines the limits of permissible discovery.[104] Under the current rule, parties may seek discovery of unprivileged matter "which is relevant to the subject matter involved in the pending action . . . ."[105] The Committee's proposal would permit discovery only of unprivileged matter "which is relevant to the issues raised by the claims or defenses of any part."[106] As its comments to this proposal expressly state, the purpose of this change would be "to narrow the scope of permissible discovery" and "to direct courts not to continue the present practice of erring on the side of expansive discovery."[107]

The change in the wording of Rule 26(b)(1) proposed by the Advisory Committee also would eliminate the phrase "subject matter" from the description of the scope of discovery, but it would not replace that phrase with the term "issues."[108] In its note to the proposed Rule 26, the Advisory Committee expressed fear that the substitution of the term "issues" for "subject matter" would invite litigation about the meaning of the new term. The Committee also doubted that the substitution would discourage "sweeping and abusive discovery . . . ."[109] The Advisory Committee endorsed the Special Committee's goal of eliminating phraseology that might "persuade courts to err 'on the side of expansive discovery,' "[110] but concluded that the best way to pursue that goal was to delete the reference to "subject matter" in Rule 26(b)(1).[111] Because the Advisory Committee's version of the new rule would eliminate the broad

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26(b)(1), which defines the scope of permissible discovery. Since the Advisory Committee recommends deletion of the phrase "subject matter" from this rule, however, the change it proposes probably would have the same effect as the change proposed by the Special Committee. The Advisory Committee explains its proposal in its note to Rule 26. *Id.* at 626-28. The recommendations of both committees with respect to the definition of the scope of discovery are considered in Part VII *infra*.

[104] *Report of the Special Committee*, *supra* note 6, at 2.

[105] FED. R. CIV. P. 26(b)(1).

[106] *Report of the Special Committee*, *supra* note 6, at 2.

[107] *Id.* at 3.

[108] *Preliminary Draft*, *supra* note 6, at 623.

[109] *Id.* at 626-28.

[110] *Id.* at 627-28.

[111] *Id.*

concept of "subject matter" from the definition of the scope of discovery, and because its note to the rule would make clear the Advisory Committee's hostility to "expansive" discovery, it appears likely that its impact on judicial attitudes would be virtually identical to the impact of the Special Committee's proposal.

The fundamental difficulty with the proposals by both committees and the comments that support them is that they would further constrict the flow of information between parties and to the trier of fact. Litigators would pounce upon either the new language suggested by the Special Committee or the deletion of the subject-matter concept as strong support for even more intense efforts to resist disclosure of potentially damaging evidence. In addition, the changes would further dilute the litigation bar's fear of sanctions[112] by increasing the likelihood in any given case that an attorney could persuade the court that it was not clearly unreasonable to conclude the information the lawyer decided not to disclose was not discoverable under the narrower, new rule. Thus, by further constricting the flow of information produced during the pretrial period, these proposed changes would abet the forces that already operate to frustrate the primary purposes of discovery.

Nor is it apparent that the change in Rule 26(b)(1) proposed by either committee would reduce the costs or complexity of litigation. The Special Committee concedes in its comments that "[d]etermining when discovery spills beyond 'issues' and into 'subject matter' will not always be easy."[113] If the adversary and economic pressures that currently dominate discovery remain intact, attempting to draw an illusive line between "issues" and "subject matter" will provoke many out-of-court disputes and much expensive case-by-case pretrial litigation. While the Advisory Committee's proposal would not necessitate elaborate efforts to define the term "issues," it undoubtedly would generate litigation directed toward interpreting the significance of the deletion of the term "subject matter" from the rule.

The committees' efforts to narrow the scope of discovery would generate other costs as well. Because the scope of discovery would be confined either by "issues" or by claims and defenses, resourceful counsel soon will begin expanding their pleadings in order to create the issues or to present the claims or defenses that are necessary to justify the kind of discovery they need or desire to conduct. The threat of narrowed discovery, then, would inspire an expansion of pleadings, which in turn would increase the cost of litigation. This increased cost would not be confined to the expense of drafting. Defenses to these pleadings would necessarily provoke more rejoinders. Motions to dismiss, to strike, and for more definite statements would proliferate. Preparing and responding to such rejoinders also would consume much attorney time and client money. Similarly, evaluating these efforts would consume valuable judicial resources. The ultimate irony is that this costly expansion of pleadings might result in extensions of the scope of discovery beyond its current range.

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[112] This dilution might more than offset the impact of the expanded sanctioning powers that the Special Committee and the Advisory Committee propose through revision of Rule 37. *Id.* at 652-53; notes 134-40 *infra* and accompanying text.

[113] *Report of the Special Committee*, *supra* note 6, at 3.

This scenario raises another disturbing question. Could a court fairly evaluate the propriety of expanded claims and defenses without permitting some expansive discovery to determine whether evidence existed to support them? Is there not a fundamental incompatibility between the concept of notice pleading and the committees' efforts to cut back the scope of permissible discovery? A key purpose of the Federal Rules of Civil Procedure was to simplify pleadings and to preclude courts and counsel from using a party's failure to comply with the elaborate technicalities of prenotice pleading as a means of preventing consideration of claims and defenses on the merits.[114] The committees' proposals, however, seem to ignore that these modern rules of notice pleading and broad discovery were developed not only in chronological tandem, but also, and much more importantly, in self-conscious functional interdependence. One purpose of broad discovery, in other words, was to flesh out the general assertions made in a complaint or answer.[115] Confining discovery to issues or to claims and defenses would result in either (1) a substantial general expansion and elaboration of pleadings followed by no net reduction in the scope of discovery, or (2) a general proliferation of costly disputes about the existence of bases for pleadings—disputes the courts would have insufficient data, absent liberal early discovery, to resolve fairly. Of the two most obvious responses to the recommendations by the committees, then, one would result in greater costs and no change in the scope of discovery, while the other would result in irrational judicial resolution of pleading disputes. Neither result is satisfactory.

Another disconcerting change proposed by the Special Committee is intended to curb misuse of written interrogatories. The Special Committee's proposal would change Rule 33, which in its present form contains no limitation on the number of interrogatories a party may propound,[116] so that a party could serve no more than thirty interrogatories without the court's permission, which would be granted only after "a showing of necessity."[117] Like the Special Committee's effort to change the scope of discovery, however, this proposal seems to elevate the interest in reducing financial and investigative burdens over the interests in maximizing disclosure and assuring fair results. This change would make it even more difficult and costly for parties to acquire evidence and leads from each other. By making the process of acquiring information from other parties more difficult and costly, the proposal would restrict even further the flow of information to the trier of fact, would increase the probability of surprise at trial, and would reduce the likelihood of fair judgments and settlements.

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[114] *See* Clark & Moore, *supra* note 80.

[115] *See, e.g.*, MOORE & FRIEDMAN, *supra* note 15, § 26.01, at 2441-42.

Moreover, limiting the number of interrogatories that a party could serve without a showing of necessity would place a greater premium on tactics in drafting and responding to interrogatories and would provoke more frequent litigation of pretrial disputes. Any increase in the premium on tactics would result in a decrease in the percentage of resources committed to dispute resolution that would be consumed by efforts to establish the truth. The requirement of a showing of necessity to justify more than thirty interrogatories consequently would increase pretrial consumption of the resources of courts and counsel by compelling parties to formally litigate their efforts to serve and to resist additional written inquiries. The costs of court resolution of such disputes might well offset any savings that otherwise might be secured by limiting the use of interrogatories.

Apparently the Advisory Committee reached the same conclusion about the costs and benefits that would accompany a nationwide limitation on the number of interrogatories a party may serve. In its *Preliminary Draft* the Advisory Committee recommends against any such limitation and proposes, as an alternative, that Rule 33 be amended to empower explicitly the majority of the judges of any district court to establish a local rule that would "limit the number of interrogatories that may be used by a party."[118] There are, however, several difficulties with the Advisory Committee's proposal. First, it does not make clear whether parties should have the right, in all districts, to petition the court for permission to serve more interrogatories than the number permitted under the applicable local rule. Nor does the Advisory Committee's formulation of the amendment suggest what standard local courts should apply in deciding whether to permit the serving of additional interrogatories. Absent some description of these standards, different district courts might well develop very different criteria for resolving these questions. This in turn could lead to increased litigation over venue disputes. Moreover, the Advisory Committee's amendment establishes no minimum number of interrogatories which all district courts would be required to permit. Thus, it would be possible for a court that was hostile to discovery to effectively eliminate the written interrogatory as a discovery tool. Removing one of the most widely used discovery devices obviously would not increase the amount of information available to parties and to the trier of fact.

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[116] FED. R. CIV. P. 33.

[117] *Report of the Special Committee*, *supra* note 6, at 18.

[118] *Preliminary Draft*, *supra* note 6, at 646-49.

In addition, it is not clear that limiting the number of interrogatories will reduce discovery costs or the aggregate amount of discovery abuse. Prodded by perennial adversarial and economic pressures, litigators are not likely to permit a limit on their use of interrogatories to produce an overall reduction in their discovery efforts. Instead, they may well spend the resources they would have committed to interrogatories on other discovery vehicles. In addition, litigators would continue to feel the intense competitive pressures that are primarily responsible for the abuse of interrogatories. With the primary cause of abuse persisting, it is not unreasonable to predict that attorneys would look for other discovery outlets for their abusive purposes. Thus, it would appear that reforms designed to restrict discovery would do a disservice to its purposes and would create no real reduction in costs or abuses.

The Special Committee and the Advisory Committee further proposed that a sentence be added to the end of Rule 33(c), which in its present form gives a party responding to interrogatories the option to specify, and provide for examination, those business records which contain answers to the submitted interrogatories. The added sentence would read: "The specifications provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained."[119] According to the comments by the Special Committee, this additional sentence is intended to compel the responding party "to specify precisely, by category and location, which documents apply to which question" and, thereby, to eliminate "the mechanical response of an invitation to 'look at all my documents.' "[120] The Special Committee also hopes that by forcing responding parties to specify under oath which documents relate to the subjects of given interrogatories, this change would "eliminate subsequent evasive use of additional documents at trial on issues confronted by the interrogatory request."[121] While this proposed addition to Rule 33(c) promises some salutary effect, that effect obviously would be limited and would not reach the more fundamental problem of nondisclosure of damaging documents that are judged by the interested and self-serving minds of the answering party and its counsel not to be precisely responsive to an inquiry or request.

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[119] *Id.* at 648; *Report of the Special Committee, supra* note 6, at 19-20.

Although the Special Committee and the Advisory Committee join in recommending several other changes in the federal rules of discovery, only two of these recommendations are potentially significant and responsive to the disclosure problems that frustrate the purposes of discovery.[122] The first of these changes would broaden and make more flexible the sanctioning process for discovery abuses.[123] Under the changes recommended by both committees, Rule 37[124] would permit the imposition of sanctions when attorneys or clients are uncooperative in the framing of a discovery plan, when counsel seek unnecessary discovery, and when the traditionally recognized forms of obstruction and deception are used.

Like the proposed change in Rule 33(c), these elaborations of the courts' sanctioning powers would have limited long-range significance. The Special Committee freely concedes that Rule 37 as currently written "has not been effective in curbing discovery abuse."[125] The Special Committee is mistaken, however, in placing responsibility for this ineffectiveness on the structure of the rule. It is unlikely that the failure of present sanctions to curb discovery abuse is attributable primarily to Rule 37 being "too narrow, fragmented and cumbersome" or to its requirement that "each failure to respond to a discovery request be dealt with by a separate motion."[126] Had they been so inclined, judges probably could have relied on their general authority to control the litigation process and the more specific powers conferred by Rules 26 and 37 to justify using the kinds of disciplinary measures that the changes in Rule 37 would make available.

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[120] *Report of the Special Committee, supra* note 6, at 20-21.

[121] *Id.* at 21.

[122] No major differences appear between the remaining recommendations of the two committees with respect to the rules of discovery. Both committees recommend, for example, that the officer who administers the oath to deponents not be required to remain present during the taking of depositions, that the taking of depositions by telephone be permitted, and that nonstenographic recording of depositions be permitted without court order. *See Preliminary Draft, supra* note 6, at 626, 629, 631-32, 639-40; *Report of the Special Committee, supra* note 6, at 9-17. The *Preliminary Draft* includes proposals for changes not only in the rules of discovery, but also in other aspects of the Federal Rules of Civil Procedure. *Report of the Special Committee, supra* note 6, at 1-6. Since the proposals in the latter category are beyond the scope of this essay, no effort to evaluate them will be made here.

[123] *Preliminary Draft, supra* note 6, at 652-53; *Report of the Special Committee, supra* note 6, at 23-25.

[124] FED. R. CIV. P. 37.

[125] *Report of the Special Committee, supra* note 6, at 24.

The history of efforts to curb discovery abuse by improving the machinery for sanctions firmly supports this skepticism. This history strongly suggests that deficiencies in policing the discovery system are not attributable to the language, scope, and structure of the rules governing sanctions. The original provisions for sanctions in the federal rules were highly praised shortly after their adoption. One of the earliest studies of the operation of the new discovery rules concluded that "Rule 37 implements the various discovery devices with a truly amazing array of sanctions: costs and attorney's fees, orders dispensing with proof, orders forbidding the introduction of evidence, orders striking pleadings or staying proceedings or dismissing the action, judgments of default, contempt, and arrest. While the variety of the possible courses of action gives the court a wide range of discretion, a zealous judge could make discovery a word of terror."[127] Immediately after so characterizing the sanctioning machinery, however, the same study declared that "[s]o far . . . the tendency is apparently in the opposite direction. The courts, exhibiting a generous attitude toward the recusant party, have deemed it better to withhold the thunderbolt on condition of future compliance than to foreclose a determination of the matter on the merits."[128] Nonetheless, a review of the few reported cases dealing with sanction problems left the authors of this study confident that the use of these new powers by the courts indicated that "the teeth" of the sanctioning provisions remained firmly in place.[129]

A decade later, after the very modest changes that accompanied the 1948 amendments to the federal rules,[130] William Speck conducted one of the earliest quasi-empirical studies of discovery.[131] The lawyers polled "generally agreed that where abuse was occurring relief could not be obtained from judges, either because judges could not learn enough about the case at the pretrial stage to rule effectively or because of trouble, expense, and delay in obtaining relief."[132] By 1958 Professor Maurice Rosenberg, who subsequently directed the Columbia University School of Law Project for Effective Justice and led the formative planning of its *Field Survey*,[133] had concluded that even though Rule 37 had been "well designed to meet the heavy responsibilities it bears in the federal procedural charter," the intervening "twenty years of use have exposed enough flaws in language, gaps in coverage, and anomalies in application to warrant its revision."[134] Professor Rosenberg felt that one of the major problems with the application of the rule was the persistent reluctance of the courts to apply sanctions vigorously to counsel who offended the spirit and the letter of the discovery rules.[135] The primary means Professor Rosenberg recommended for improving this problem was to reform the structure and language of Rule 37 so as to remove verbal barriers, such as the words "refusal" and "willfully," to aggressive and flexible enforcement of discovery obligations.[136] He also exhorted judges to display "determined self-discipline" in administering their sanctioning powers, to "grasp the rule firmly and apply it imaginatively."[137] He suggested, as an example, that judges "might insist on special supervision, by either a judge or master, of the discovery procedures in particular types of actions known to be troublesome in their pretrial stages."[138]

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[126] *Id.*

[127] Pike & Willis, *Federal Discovery in Operation*, 7 U. Chi. L. Rev. 297, 326-27 (1940).

[128] *Id.* at 327.

[129] *Id.*

[130] *Amendments to Rules of Civil Procedure for the United States District Courts, with Advisory Committee Notes*, 8 F.R.D. 591 (1949).

[131] Speck, *supra* note 15.

Professor Rosenberg's call for reform went unheeded for another decade. In the meantime, however, more evidence and opinions were marshalled in support of the need for change. An extensive review of the law and literature of discovery appeared in the *Harvard Law Review* in 1961.[139] Its authors concluded that despite the availability under the rules of

> a broad array of sanctions of differing severity [and] that courts are empowered to fit the penalty to the fault, it appears that on the whole they [both federal and state courts] have been rather lenient. Even where there has been

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[132] *Id.* at 1153.

[133] Rosenburg, *Preface* to FIELD SURVEY, *supra* note 42 (background information about the research staff).

[134] Rosenberg, *supra* note 91, at 486.

[135] *Id.* at 495.

[136] *Id.* at 497.

[137] *Id.*

[138] *Id.* As pointed out below, this idea is an embryonic version of the concept of a "discovery conference" to which the Special Committee, the Advisory Committee, and I are attracted.

[139] *Developments in the Law—Discovery*, *supra* note 15.

> clear noncompliance by failure to appear for the taking of a deposition, the recusant party is usually allowed at least one more opportunity to appear if there is any indication that the information may be forthcoming.[140]

It was Professor Rosenberg's own *Field Survey*, however, whose conclusions generally were so charitable to the practice of discovery, that produced the most damaging evidence of the anemic and ineffective use of the sanctioning power in discovery disputes. Interpreting the *Field Survey* data, Glaser concluded not only that sanctions were rarely imposed for violations of the discovery rules, but also that "the crudity of the sanctions and the caution of the judges has *[sic]* resulted in depressing the initiative of the lawyers, and the initiative of the lawyers is essential to set events in motion in an adversary system."[141] The *Field Survey*'s most graphic illustration of the dormancy of the sanctioning power was that despite the courts' authority under Rule 37(a) to impose costs on a recalcitrant adversary, "only one out of 527 docket sheets reported this potentially effective procedure."[142] This statistic is particularly instructive because the sanction to which it refers is so mild. Judges who are reluctant to impose small economic penalties presumably are even less likely to apply the more severe sanctions that the rules clearly permit.[143]

The reforms for which Professor Rosenberg and other students of discovery had been lobbying finally occurred in 1970 through amendments to the Federal Rules of Civil Procedure.[144] In its note to Rule 37, the Advisory Committee conceded that "[e]xperience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed."[145] The Advisory Committee also acknowledged that the authority granted under Rule 37(a) to impose economic sanctions "in fact . . . has been little used."[146]

The drafters of the 1970 amendments incorporated many of the reform proposals that commentators like Professor Rosenberg had recommended. They eliminated from Rule 37, for example, the requirement of wilfulness in subdivision (d); they shifted the presumption under subdivision (a) in order to compel a losing party to justify conduct that resulted in an adverse order; they gave courts greater flexibility in the selection of sanctions; and they clarified the courts' authority to resort to modest penalties when unconditional remedies seemed too severe.[147] The Advisory Committee's discussion of its rationale regarding the shift of the presumption under subdivision (a)(4) is particularly noteworthy. According to the Committee, "the change in language [of this subdivision was] intended to encourage judges to be more alert to abuses occurring in the discovery process."[148] The Committee obviously sought to use this change as a means to propel the federal judiciary into a more activist posture toward discovery abuse. The Committee clearly articulated that intention in another paragraph of the note, explaining this change by stating that the "amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices."[149]

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[140] *Id.* at 991.

[141] W. Glaser, *supra* note 15, at 156; *see also id.* at 154-56, 210-11.

[142] *Id.* at 155.

[143] Glaser reports that "unconditional sanctions" were applied in only one of the 1232 cases studied through questionnaires and interviews in the *Field Survey*. *Id.*

[144] 48 F.R.D. 459 (1970).

[145] *Proposed Amendments*, *supra* note 82, at 538.

[146] *Id.* at 540.

These amendments were greeted with the same kind of enthusiasm and great expectations for change that greeted the original rules in 1938. Professor Rosenberg's response to the amendments is particularly interesting because of the important role he played in identifying the need for reform and in suggesting the shape the changes should take. His evaluation in 1972 of the amended provision was vigorously optimistic. The revised rule, he wrote,

> tries to create a streamlined, updated, modernized apparatus for sanctions against obstructions or aggressions in the discovery process. Rule 37 provides sharper teeth, has more flexible jaws, and has quicker responsiveness to abuses in the discovery process than was available before.
>
> Revised Rule 37 also corrects quite a few flaws in the sanctions mechanism that turned up prior to the adoption of the 1970 amendments.[150]

If the ABA's current Special Committee for the Study of Discovery Abuse is correct in its strongly held view that the version of Rule 37 that emerged from the 1970 reforms "has not been effective in curbing discovery abuse" and "is insufficient to bring about the effective imposition of discovery sanctions,"[151] on what grounds can one be optimistic that yet another redrafting and streamlining of Rule 37 will result in significantly more effective enforcement of the discovery rules? History strongly suggests that the problems that continue to plague the sanctioning machinery are not primarily attributable to deficiencies in judicial power. Those problems appear to stem, rather, from more fundamental sources. One such source, ironically, may be the judiciary's laudable concern to see that disputes are resolved on the merits. As some commentators have pointed out, the courts have reluctantly imposed sanctions that foreclose opportunities to reach the merits. This reluctance is inspired by the same spirit that motivates most modern procedural reforms and is reinforced by the judiciary's conviction that it is unfair to penalize clients for their lawyers' misconduct.[152] The infrequent manner in which the modest costs of motions are imposed,[153] however, indicates that the courts' failure to enforce aggressively the rules of discovery cannot be attributed primarily to their interest in reaching the merits of a case or their concern about punishing clients for the transgressions of their attorneys.

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[147] *Id.* at 539-42. Glaser, among others, had concluded that one reason courts so rarely invoked their sanctioning power was their belief that the most obviously available penalties seemed too drastic. *See* W. GLASER, *supra* note 15, at 154-55.

[148] *Proposed Amendments, supra* note 82, at 539.

[149] *Id.* at 540.

[150] Rosenberg, *New Philosophy of Sanctions,* in NEW FEDERAL CIVIL DISCOVERY RULES SOURCEBOOK 140 (W. Treadwell ed. 1972), *quoted in* Comment, *supra* note 40, at 361 n.6. The author apparently shared Rosenberg's enthusiasm for the reforms.

[151] *Report of the Special Committee, supra* note 6, at 24.

Another perhaps more persuasive explanation of the courts' reticence might be traceable in large measure to the judges' understanding of how counsel must respond to the obligations and pressures of adversarial advocacy. As former lawyers, most judges probably know from experience that the high commandment of loyalty to the client and the intense adversary context in which that loyalty must be proven can make resisting disclosure of damaging evidence and using discovery devices to gain tactical advantages seem thoroughly consistent with the highest standards of the profession. Judges know that litigators are required to resolve doubts in favor of their clients and to pursue their clients' interests as zealously as the bounds of the law permit.[154] It is hardly surprising, therefore, that judges who respect these rules, who were acculturated professionally under the adversary system, and who understand the pressures it generates, tend to err on the side of lenience when asked to sanction counsel who have fought perhaps too vigorously to protect their clients.

Refining the machinery for imposing sanctions is unlikely to produce a substantial increase in the use of sanctions if the judiciary's under-utilization of this sanctioning power is attributable to its concern about reaching the merits of controversies and its sympathy with the motives of counsel who resist disclosure. Nor is it likely, however, that even a substantial increase in the use of sanctions would root out the most troublesome problems facing modern discovery. Since these problems are directly traceable to the adversary and economic pressures which currently dominate discovery, a high level of abuse will probably persist until some of these shaping pressures can be changed.

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[152] *See* W. Glaser, *supra* note 15, at 154; Rosenberg, *supra* note 91, at 495; *Developments in the Law—Discovery*, *supra* note 15, at 990-91.

[153] W. Glaser, *supra* note 15, at 154-56, 210.

[154] ABA Code, *supra* note 39, Canon 7, EC 7-1, 7-3.

The proposal by the two committees that appears to offer the most promise for coping with the problems that plague discovery is the utilization of a discovery conference.[155] Under this proposal, the court could hold such a conference if requested by either party and if certification has been presented to show that counsel have failed to resolve through private negotiations the matters set forth in the request for the conference.[156] At the conference the court would have broad powers to define issues, establish plans and schedules for discovery, set limits on the discovery that is to take place, and allocate discovery expenses. After the request for the conference and the certification necessary to justify it are received, the court would have control over both the scheduling and the scope of the conference.[157]

In its comments to this proposal, the Special Committee pointed out that the specific provisions of the proposed rule governing the discovery conference resulted from a compromise of conflicting opinions and considerations. The most fundamental of these conflicts apparently was over the extent to which control of discovery "should be left to the adversary lawyers" or relegated at an early stage to the judiciary.[158] It appears that the proponents of the view that most of the control over discovery should remain in the hands of the adversary lawyers prevailed. While in its comments the "Committee urges strongly that at least the alternative of early judicial control should be available," it also states that the new rule would continue "to impose principal responsibility upon the litigating Bar for the preparation of a case."[159] Moreover, the Committee contemplates that "the discovery conference should be the exception rather than the rule"[160] and that "in the great majority of cases, opposing counsel should be able, without judicial intervention, to formulate an appropriate plan and schedule of discovery in relation to issues readily defined by agreement."[161]

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[155] *See Preliminary Draft, supra* note 6, at 624-26; *Report of the Special Committee, supra* note 6, at 4. The proposals by the two committees for the discovery conference are in substance indistinguishable.

[156] *Report of the Special Committee, supra* note 6, at 4.

[157] *Id.*

[158] *Id.* at 5.

[159] *Id.*

[160] *Id.* at 6.

These expectations about the willingness and ability of opposing counsel to cooperate sufficiently to avoid the need for judicial intervention in discovery seem overly optimistic. None of the changes in the federal rules proposed by the committees purport to convert adversary attorneys into allies. Nor do they attempt to reduce the competitive and economic pressures which so largely shape conduct by litigating counsel. Without such changes in the conditioning context within which attorneys work, it is unreasonable to expect their basic instincts, objectives, and modes of behavior to change. They will remain competitive, secretive, suspicious, and cautious. They will aggressively pursue advantages for their clients and will seek to capitalize on the vulnerabilities of opposing counsel and parties. The Rules of Professional Responsibility, the fear of being sued for malpractice, the desire to maximize their own fees, and deeply ingrained adversarial habits will prevent them from cooperating with or trusting an opponent whenever doing so appears to jeopardize an interest of a client.

If the proposed discovery conference rule is adopted and if the framing of an appropriate discovery plan by agreement remains the exception rather than the rule, one of two developments would likely ensue. First, the discovery conference would go largely unused. There is nothing in the proposed rule that would make such conferences mandatory, that would empower a court to call a conference on its own initiative, or that would command opposing counsel to try to define issues and frame a comprehensive discovery plan. Litigators who presently enjoy the largely unregulated and unmonitored environment of discovery or who fear early judicial intervention, whether because it might be arbitrary, ill-informed, biased, or simply unpredictable, are unlikely to request a discovery conference. Moreover, if their opponents' behavior makes judicial help seem essential, counsel who are uncomfortable with the idea of early judicial interference will probably resort to the limited motions that currently are used in such circumstances. Even attorneys with more hospitable attitudes toward judicial intervention might be inclined to proceed with discovery without the optional conference, at least until a clear need for it arose. Such factors as the time and energy that would be consumed first by trying to reach a formal private agreement with opposing counsel and then by requesting, preparing for, and attending a discovery conference are likely to foster this reluctance.

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[161] *Id.* at 5. The Advisory Committee's note about the discovery conference expresses similar expectations that requests for these conferences will not be made routinely, that counsel should be able to resolve most discovery matters without judicial intervention, and that the discovery conference should take place only in the exceptional case. The Advisory Committee adds that it is "extremely reluctant even to appear to suggest additional burdens for the district courts." *Preliminary Draft*, *supra* note 6, at 628.

Second, discovery conferences would produce a substantial increase in the cost of pretrial litigation. Under the committees' proposal, an attorney will be granted a discovery conference only after he has first attempted to reach an agreement with opposing counsel that would (1) identify the issues, (2) establish an overall discovery plan, (3) schedule its components, and (4) define any limitations that would be imposed on the use of individual discovery devices. The attempt to reach such a broadly scoped agreement would be very costly. That cost would result in part from the jockeying and precautionary measures that are spawned by adversary relationships and in part from the great complexity of the undertaking. For example, discovery can include numerous devices, its needs can change substantially over the course of a long pretrial period, those needs can be very difficult to predict in the early stages of a law suit, and counsel realize that their perception of what constitutes the issues in a given case can change dramatically as a result of discovery. Thus, the cost simply of trying to qualify for a discovery conference could be substantial.

The costs that would be generated by the discovery conference would not be confined, of course, to satisfying this first requirement. Substantial costs also would be generated in preparing the certification describing the failure of the private effort, drafting the request for the conference, which must include a statement of the issues, a proposed plan and schedule of discovery, and suggested limitations on the discovery proceedings, filing objections to the request for the conference and responding to those objections, preparing for and attending the conference itself, and protesting against or appealing objectionable portions of the resulting discovery order. Finally, since discovery needs and strategies can change greatly during the pretrial period, it would be unreasonable not to anticipate significant additional expenses arising as counsel attempt to make and to resist the showings of good cause that are required under the proposed rule in order to alter or amend an original discovery conference order.

Despite these serious reservations, the idea of a discovery conference represents a step in a constructive direction. A discovery conference that is not mandatory, however, and that takes place in the present adversarial environment cannot contribute significantly to solving the fundamental problems that plague modern discovery.

Unless implementation of the discovery conference were accompanied by major changes in the context within which discovery takes place, the primary purposes of the conference would be frustrated by the same adversarial and economic pressures that currently frustrate the purposes of the entire discovery apparatus.

While early and aggressive judicial intervention might prevent some of the more obvious forms of discovery abuse—the bad faith use of discovery demands to impose suffocating burdens on the economic and professional resources of less resourceful opponents—the discovery conference, by itself, would not enable the court either to control the trial preparation process or to assure that parties disclose all the significant evidentiary information that they control. The Special Committee's comments to the proposed rule suggest that the availability of a discovery conference would create "the alternative of early judicial control . . . ."[162] This is a false promise. Without major changes in the adversary rules that shape the pretrial environment, there can be no effective judicial control of discovery. If the rules of the adversary game are left essentially intact, interjecting a judicial officer into the discovery process will simply add another adversary (the court) to the combat. Counsel and clients will continue to conceal material evidence until clearly compelled to divulge it, resist disclosure of damaging information, and seek ways to gain advantages over opponents through the use of discovery tools.

In order for judicial control to be effective, intelligent, and fair, this control would have to be based on a thorough knowledge of the matters in dispute. Under the current rules of litigation, however, it would be virtually impossible for a judge to have that kind of knowledge at an early discovery conference. Antagonistic lawyers, loyal to their clients, certainly would not serve as reliable sources of such knowledge. They would be willing to share with the court only information that appeared beneficial to their clients. Moreover, since the discovery conference would take place at an early point in the litigation process, neither opposing counsel nor the court would likely know enough to be able to uncover all the significant data from a wily adversary. Nor does the court have the time to read all the documents in all the files of all the parties. Without some assurance that it knew as much about the case as the lawyers, the court could never be confident that its discovery decisions would maximize the likelihood of uncovering all the relevant evidence, or that they would impose no unfair burden or handicap on any party.

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[162] *Report of the Special Committee, supra* note 6, at 5.

Because adversaries feel constrained to keep the court ignorant of facts whenever doing so would be helpful to their clients, the court's "control" would be rational and fair only fortuitously.

Nor would the proposed discovery conference give the court real control over the design and execution of the discovery it ordered. While in some cases a judge might be able to review interrogatories, requests for admissions, and document production demands without a great expansion of its resources, the court rarely would be able to examine all the produced documents, to attend depositions and physical examinations, to observe experiments and demonstrations, to visit the scene of events, or to participate in other discovery exercises. Because the court would be unable to monitor all these important discovery processes, its control would remain limited and incapable of assuring thorough, unbiased inquiries that would lead to complete disclosure of all key data.

VIII. Toward an Alternative

As the foregoing discussion makes clear, I believe that discovery cannot serve effectively its intended purposes unless substantial changes are made both in the environment in which it is conducted and in the extent and quality of judicial control over its processes. While I will venture some suggestions for such changes, I cannot pretend to offer a fully refined blueprint for an alternative discovery system. Nor have I been able to explore all the ramifications that might accompany the changes I propose. My hope, rather, is that these recommendations will provoke within the profession a spirited and constructive debate about the fundamental structure of civil discovery.

The concerns that provoked the suggestions that follow were eloquently articulated by Judge Frankel in his 1975 Cardozo Lecture:

> [W]e may say that it is the rare case in which either side yearns to have the witnesses, or anyone, give *the whole truth*. And our techniques for developing evidence feature devices for blocking and limiting such unqualified revelations.
>
> The devices are too familiar to warrant more than a fleeting reminder. To begin with, we leave most of the investigatory work to paid partisans, which is scarcely a guarantee of thorough and detached exploration. Our courts wait passively for what the parties will present, almost never knowing—often not suspecting—what the parties have chosen not to present. The ethical standards governing counsel command loyalty and zeal for the client, but no positive obligation at all to the truth. Counsel must not knowingly break the law or commit or countenance fraud. Within these unconfining limits, advocates

freely employ time-honored tricks and strategems to block or distort the truth.[163]

The core of the changes I propose to combat these problems can be summarized as follows: shifting counsel's principal obligation during the investigation and discovery stage away from partisan pursuit of clients' interests and toward the court; imposing a duty on counsel to investigate thoroughly the factual background of disputes; imposing a duty on both counsel and client to disclose voluntarily, and at all stages of trial preparation, all potentially relevant evidence and information; narrowing the reach of the attorney-client privilege and the work product doctrine; making early discovery conferences mandatory; substantially expanding the role of the court in monitoring the execution of discovery; and requiring thorough judicial review of, or participation in, all settlements that exceed a specified dollar amount.

These reform proposals are logical derivatives of the basic premise of this essay—that because the pressures generated and the loyalties commanded by the adversary relationships currently dominating litigation are largely responsible for the frustration of the purposes of discovery, meaningful reform does not seem possible without changing these pressures and shifting these loyalties. Toward that end I recommend major changes in the Federal Rules of Civil Procedure and in the Code of Professional Responsibility, changes designed to reduce as much as possible the sway of adversary forces in the discovery process. The Code of Professional Responsibility, for example, currently treats litigation almost monolithically, making few significant distinctions between criminal and civil actions or between the various stages of lawsuits. A breakdown of this monolithic approach is required. Canons and disciplinary rules especially tailored to civil matters should be drafted. Moreover, ethical standards should be refined in order to distinguish between the different requirements of the investigative and discovery stages, on the one hand, and the trial and post-trial stages on the other.

In particular, new rules of professional responsibility and civil procedure should be fashioned for the investigative and discovery stages. During these stages, counsel should be directed to view themselves primarily as officers of the court rather than partisan advocates. As officers of the court, counsel should be commanded by new ethical directives and civil rules to search diligently for all data that might help resolve disputes fairly and to share voluntarily the results of their searches with both the court and the other parties to the action. Under this new system, the court would determine at discovery conferences how much investigation counsel would have to undertake in given cases to comply with this general obligation. In making this determination at the outset of the litigation and in refining it over the course of the pretrial period, the court would strive to balance the investigative burden equitably among all participating counsel. Under the changes proposed here, counsel's primary loyalties during the trial and post-trial stages would remain where they are today: to their clients.

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[163] Frankel, *supra* note 1, at 1038 (emphasis in original).

The new ethical directives and civil rules also would make clear that the duty to disclose voluntarily all potentially relevant information is not confined to the fruits of formal investigations but extends to all material data, regardless of how it is acquired. As Judge Frankel has suggested, such rules not only should compel disclosure of material facts but should also explicitly forbid material omissions.[164] To be effective these commands to disclose would have to be accompanied by several additional changes in current ethical and procedural rules. The provision of the Code of Professional Responsibility that directs litigators to resolve all doubts in favor of their clients,[165] for example, would have to be modified so as to apply only to legal arguments made during the trial and post-trial stages. A new ethical prescription would have to be added that would compel litigators during the investigative and discovery stages to resolve all doubts in favor of the broadest investigation and the fullest possible disclosure.

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[164] *Id.* at 1057. Judge Frankel was courageous enough to submit in his essay a draft of a new disciplinary rule which he hoped would compel full disclosure. His effort deserves reproduction here:

> (1) In his representation of a client, unless prevented from doing so by a privilege reasonably believed to apply, a lawyer shall:
>
> (a) Report to the court and opposing counsel the existence of relevant evidence or witnesses where the lawyer does not intend to offer such evidence or witnesses.
>
> (b) Prevent, or when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any omission to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading.
>
> (c) Question witnesses with a purpose and design to elicit the whole truth, including particularly supplementary and qualifying matters that render evidence already given more accurate, intelligible, or fair than it otherwise would be.
>
> (2) In the construction and application of the rules in subdivision (1), a lawyer will be held to possess knowledge he actually has or, in the exercise of reasonable diligence, should have.
>
> Key words in the draft, namely, in (1)(b), have been plagiarized, of course, from the Securities and Exchange Commission's rule 10b-5. That should serve not only for respectability; it should also answer, at least to some extent, the complaint that the draft would impose impossibly stringent standards. The morals we have evolved for business clients cannot be deemed unattainable by the legal profession.

Id. at 1057-58 (footnote omitted). This draft obviously falls short of the comprehensive directive I envision. It is heavily trial oriented, for example, and fails to command counsel to disclose in advance of trial all the information that might be helpful in resolving the dispute. Moreover, its exclusion of arguably privileged material substantially circumscribes its scope and might provide counsel with a rationale for evading the duty it seeks to impose.

This comprehensive duty to disclose also would have to be integrated with the various privileges against disclosure and the work product doctrine. The specific character of that integration would be an extremely important and complex matter that is beyond the scope of this essay. It is important to note, however, that meaningful disclosure probably could not be accomplished without significantly narrowing the current reach of both the attorney-client privilege and the work product doctrine. An attorney's work product, for example, could not be permitted to embrace the results of private interviews with witnesses. Indeed, work product probably would have to be confined very narrowly to legal research, legal theorizing, and tactical planning. Similarly, the attorney-client privilege in civil actions would have to be narrowed in order to prevent clients and counsel from using it to shield factual information from disclosure. Clients still might be permitted to prevent disclosure of specific feelings, opinions, and theories that relate to the litigation, but they would not be allowed to invoke the privilege as a means of denying access by the court and opposing parties to material evidence.

This proposed shift during the discovery stage of counsel's primary obligation away from purely partisan advocacy and toward full disclosure has some potentially troublesome implications for the traditional relationship between counsel and client. For example, clients might feel more pressure not to divulge to their attorney evidence they fear could damage their case. Clients also might feel that it is unfair to ask them to pay an attorney whose loyalties are divided between serving a public interest in justice and the clients' private interest in victory. While these problems could be significant, their dimensions are readily subject to exaggeration, and they probably are not insurmountable. Even under current rules, for example, clients frequently are reluctant to share clearly inculpating evidence with their attorneys. Such reluctance may stem from clients' failure to understand the ways the rules of professional responsibility and evidence can work to protect them, from their fear of being morally condemned by their lawyer, or from cynical appreciation that if they share certain information with their attorney they lose full control over whether it will be disclosed. In short, it simply is not clear that the changes I propose would alter to a considerable extent the way most clients share information with their counsel. It seems reasonable to predict that clients who are predisposed to be honest with their attorneys probably would continue to be so, and that clients who are not so predisposed probably would not change their behavior in significant ways.

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[165] ABA CODE, *supra* note 39, EC 7-3.

Nor does it seem likely that clients would mount a massive resistance to payment of fees to lawyers whose obligations during the discovery stage were more equally divided than they are today between advocacy and disclosure. While re-education of some clients' expectations might be required, the percentage of clients who would be willing to insist publicly that they have a right to buy legal service for the purpose of securing unfair results is probably small. Nor is there any obvious reason for encouraging users of the legal system to believe they enjoy a right to pursue injustice by whatever means are not explicitly proscribed by the unusual ethical rules of the legal profession. The changes I propose, however, would not deprive clients of the vigorous representation of committed advocates. Litigators would continue to fight, even during the discovery stage, for exposure and interpretation of evidence favorable to their clients. The only substantial difference between the current system and the rules I propose would be that lawyers and clients would not be permitted to deliberately distort the decisionmaking process by failing to disclose relevant information.

This mandate to disclose would not be fully effective, however, without establishing the procedural machinery for making disclosures and for enforcing the duty to disclose. There probably are several different procedural forms that could be devised to act as the principal vehicle for disclosure. Certain minimum features, however, should be included. One is to reduce the disclosed information as completely as possible to some permanently recorded form. This requirement is essential in order to assure the reliable sharing of information between all parties and the court, to preserve the shared information, to establish the record necessary to control the presentation of evidence at trial, and to evaluate the propriety of imposing sanctions for breaching the duty to disclose. Another requirement that should be built into the disclosure procedure calls for periodic updating and supplementing of the information provided at the initial stages of the litigation process. There are two junctures at which some formal disclosure should be required in every civil action: (1) immediately after the issues have been joined through the filing of pleadings; and (2) at the close of the first major investigative period. New rules also should make some provision, however, for subsequent periodic disclosures, the precise timing of which might best be left for determination by the judge presiding over the discovery conferences.

Since the duty to disclose is a central feature of the procedures I am proposing, devising a set of controls, encouragements, and sanctions that would maximize compliance with this duty is critically important. Candor compels acknowledgement, however, that designing a just and effective system of incentive and enforcement for this purpose would be a most difficult task. No such system could eliminate the possibility of abuse or thwart every evasive effort by the intentionally dishonest. There are, however, several measures whose implementation could reduce substantially the likelihood of certain repeated breaches of this duty to disclose that would jeopardize most seriously the fairness of the proposed procedures.

One such measure would be to require both counsel and client to swear under oath on every disclosure occasion and at the close of the pretrial period that they had searched diligently for and disclosed all information that arguably might be relevant to the dispute in question. Rules of court and of professional responsibility would make it clear that a disingenuous oath could expose counsel and client to a range of serious sanctions, including conviction of perjury, citation for contempt, dismissal of claims or defenses, entry of judgment against the offending party, and the full range of professional disciplinary actions, including permanent disbarment. New rules also could be framed that would prohibit a party from using for any purpose evidence that was subject to the duty to disclose, but was not disclosed, provided counsel or client knew or should have known of the evidence. In appropriate circumstances this prohibition could be extended to any additional information or evidence that the offending party or attorney would not have acquired without the information or evidence that was not disclosed.

Another device that might prove useful in enforcing the duty to disclose would be to require counsel and client to identify for the court and other parties all the sources from which information or evidence was sought. At a minimum this rule should compel attorneys and parties to provide sufficient information to enable the court or representatives of other parties to locate each consulted source. This information would equip other interested parties and the court to pursue the matter if they chose to do so. The scope of the information this rule would require from parties could be expanded if experience proved such an expansion necessary. In the alternative, the rule could vest in judges monitoring discovery the power to fix the extent of this requirement in accordance with the needs of individual cases. Either in given cases or in all actions, for example, attorneys and parties could be required to provide sufficient information not only to identify and locate each possible source but also to ascertain the issues or subject matters about which the person who initially consulted the source thought it might offer information.

A series of mandatory discovery conferences would be essential, at least in the more complex cases, in order to achieve all the objectives of this alternative system for gathering and sharing data. Such conferences, over which judges or magistrates would preside, would equip courts to monitor discovery and disclosure in greater detail. The scope and number of such conferences could be tailored to the size of individual cases. In smaller and less complex suits, for example, the conferences could be brief and the extent of judicial intervention might be quite limited.

The first discovery conference should be held immediately after the issues have been established by the filing of responsive pleadings. This initial conference would have several purposes. First, it would define clearly the legal and factual matters that are relevant and actually in dispute. Second, this initial conference would determine what potentially relevant information might be within the control of, or most readily accessible to, each of the parties. As part of the process leading to this determination, the parties and their counsel would be required to identify all possible sources of relevant testimonial and tangible evidence. They would be asked not only to list prospective witnesses and types of potentially relevant documents, but also to describe the content of the information each possible source might be expected to yield. Such lists would be drafted and filed several days before the first discovery conference was to convene and would provide each party with an opportunity not only to state its version of the issues but also to tell the court what kinds of data other parties should be required to search for and produce. While requirements like these would impose potentially costly burdens on clients and counsel, the extent of those burdens would vary in direct proportion to the size and complexity of the case. Complying with these requirements in small or simple cases would not be a major or taxing undertaking. Moreover, the extra systematic work and expense at this early stage might result in an overall reduction in the cost of the litigation.

Based on the information presented prior to and during the initial discovery conference, the court would issue its first investigative order. In addition to defining issues and identifying uncontested legal and factual points, this order would specifically define the scope and the components of the investigation each party was to undertake. For example, the order might direct one party to search for certain categories of documentary and other tangible evidence, to arrange for medical or vocational examinations of parties, to have specified photographs taken, or to obtain statements from certain prospective witnesses.

Determining how to handle the acquisition of oral information from witnesses and parties during this investigative stage would require a thorough examination of alternatives and conflicting values that is beyond the scope of this essay. One conclusion to which such an examination might well lead, however, is that all parties and witnesses should be required to submit sworn statements in which they detail all the factual information they have about the issues in dispute. In some circumstances it might be preferable to have a judge, magistrate, or clerk take these statements, especially from key witnesses. To improve the likelihood that the statements would contain all the essential background information and would cover all the subject areas in dispute, the judiciary and state bars could work together to develop forms to guide the interviewer. Counsel and the court could adapt and amplify these forms during discovery conferences to fit the needs of given lawsuits. Where the circumstances warrant it, the statements of important witnesses and of parties could be videotaped for subsequent study by the court and counsel.

Such statements would serve several purposes. They would equalize access to important information. They also would provide a means of reducing surprise at trial and of deterring both perjury and more subtle self-serving shifts in testimony. These purposes could be further promoted by prohibiting testimony at trial, at least in the absence of very compelling special showings, that went beyond or was inconsistent with information in the statements or in other pretrial discovery documents. The existence of such statements also could substantially reduce deposition costs. In many instances the content of a statement might persuade counsel or the court that deposing the witness was unnecessary. The likelihood that counsel would be so satisfied probably would increase if the statements were taken by a judicial officer and were videotaped. Even when the statements did not eliminate the need for depositions, they could be used by the courts and the lawyers to sharpen the focus and to limit the scope of deposition questioning. When a statement appears to the court to be sufficiently comprehensive, the court may require a showing of good cause before permitting the deposition of the witness who gave it. Similarly, in appropriate circumstances the court could issue an order confining the questions in the deposition to certain topics or purposes—cross-examination to develop bases for impeachment, for example.

The court order resulting from the initial discovery conference would fix the date for the first follow-up conference. It also would direct counsel to complete their assigned investigative work and to file the results far enough in advance of this second conference to permit the court, other counsel, and parties to evaluate the submitted materials and to frame questions, objections to the quality of the investigation, or requests for additional probes. At the follow-up conference the court would review the quality of compliance with its first discovery order. During this review it would report its impressions of the materials filed by counsel, hear arguments about compliance problems, consider requests for additions to or modifications of its initial order, and evaluate the propriety of imposing sanctions for deficiencies in the investigative performances by the attorneys or for failures by parties to cooperate in the disclosure process. Using the data generated in the first investigative effort, the court might undertake to refine the list of issues in dispute and to extend the list of factual and legal points about which the parties agreed. In some cases this follow-up conference also might be an appropriate time to consider motions to dismiss or for summary judgment, or to begin actively encouraging settlement.

If the court were unable to dispose of the matter by any of these means, it would proceed to consider needs for additional investigation and requests from counsel to conduct limited adversary discovery. In considering how best to advance the case toward trial and to encourage settlement, the court would begin with presumptions in favor of minimizing the amount of adversary discovery and maximizing the use of more straightforward investigative tools. Despite these presumptions, however, the court would permit certain traditional forms of adversary discovery when convinced that they are the most likely means to establish reliable evidence or are necessary to assure parties of adequate trial preparation. Depositions of experts and of key party-witnesses probably would fall with some frequency into this category. At this relatively mature stage in the litigation, the court also might permit parties to serve limited numbers of specific requests for admissions or, less frequently, interrogatories.

This alternative system for gathering and organizing information obviously contemplates a much larger and more aggressive pretrial role for the judiciary. In addition to the functions described in the preceding paragraphs, this expanded role should include the power to participate directly in both the investigation and discovery stages of litigation. A court should be empowered, for example, to pose written or oral questions to parties, witnesses, or attorneys whenever the court is unsatisfied with the quality or comprehensiveness of questions propounded by counsel. Similarly, a court on its own initiative should be able to request admissions of fact and the production of documents from parties. It also should be permitted to participate in depositions directly or through a magistrate or clerk. While these kinds of powers should exist to improve the likelihood that neither the incompetence nor the adversary motives of counsel will leave major holes in the evidentiary record, judges should be directed to employ these tools sparingly and only when required to do so in the interests of justice.

Expansion of the judiciary's role in pretrial processes should include one additional dimension. Court approval should be required for all settlements that exceed a specified dollar value, such as $5000. Moreover, to make such approval meaningful, a judge, preferably the one who has monitored the investigation and discovery in the case, should either participate directly in the final settlement negotiations or thoroughly review the terms of the settlement agreement before it is signed. The purpose of such well-informed judicial involvement would be to decrease the likelihood that disparities in the resources of parties or the competence of counsel will result in an unjust settlement.

The changes I propose obviously would increase greatly the burdens on the judiciary and require a major expansion of its personnel and supportive resources. While implementing the proposals discussed here clearly would increase the direct dollar cost to the public of resolving civil disputes, such changes might well reduce the total consumption of social resources for which litigation currently is responsible.[166] Substantial savings might be achieved by removing adversary jockeying as much as possible from the process of gathering and organizing the relevant factual information and by increasing the judiciary's capacity to rationalize and streamline the process of preparing cases for trial. Savings also might be realized through the court's ability to encourage fair settlements during or at the close of the investigative stage, before adversary struggles begin their voracious consumption of clients' and society's resources. One of the hopes that inspires these proposals is that by increasing direct expenditures on the process of dispute resolution, we can decrease its indirect and overall social cost.

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[166] Careful cost analysis of the existing system and of all arguably feasible alternatives obviously would be necessary before launching any attempt to make major institutional changes of the kind I propose.

Nor can it be seriously disputed that this overall social cost is high. Presently, the cost of discovery even in cases of modest size can be sufficiently high to discourage all but the wealthiest clients from using the courts.[167] The immense economic cost of discovery in larger and more complex litigation has been a subject of great concern for many years.[168] Moreover, these massive expenditures on discovery are not confined to large private corporations. A governmental agency or other publicly supported entity is often a party to the most complicated and costly civil actions. One current example is the FTC's antitrust action against several major oil companies.[169] In these proceedings, thousands of attorney hours already have been committed to discovery, even though only the tip of the evidentiary iceberg has been disclosed. The point here is that when the government is involved in litigation, taxpayers bear the cost. Even when the only parties to complex litigation are private corporations, the public generally absorbs much of the cost of resolving the dispute. Corporate parties pass along their litigation costs to consumers in the same way they pass along their other business costs.

These observations about the financing of major litigation are intended to dispel simplistic illusions that the great cost of civil discovery in complex cases is not a social problem because large corporate litigants bear the brunt of that cost. If it is true that only the users of the legal process pay for our costly system of dispute resolution, then virtually all of us are its users. Indirectly, as taxpayers, consumers, and shareholders, most Americans foot some portion of the bill for most of the major litigation in this country. It follows, then, that the dollar cost of complex commercial litigation between private parties is a societal problem in whose solution virtually every citizen has a real economic interest.

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[167] A dozen years ago an experienced Philadelphia trial attorney suggested one way of calculating part of the cost of discovery in smaller litigation. Griffin, *supra* note 40. Griffin estimated that a modest discovery schedule in a simple lawsuit could consume about 75 hours of an attorney's time. *Id.* at 15-16. At a $50 per hour fee, the cost of that attorney's time in discovery would be $3750. That figure, of course, does not include the cost of stenographic transcription of depositions, of document productions and duplications, of medical examinations, or of consultations by experts. From these figures it is clear that the investigation and discovery necessary to prepare for even a simple trial could cost well in excess of $5000—a sum that makes litigation by individuals of anything but major disputes economically infeasible.

[168] Even the interpreters of the data produced by the Columbia University *Field Survey* conceded that in "the heavy-discovery case," discovery "can become expensive in both time and money, in comparison with the average case." W. GLASER, *supra* note 15, at 201. *See also* Kaufman, *supra* note 11, at 121-22.

[169] *See generally* FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir. 1977); Exxon Corp. v. FTC, 436 F. Supp. 1019 (D. Del. 1977); Exxon Corp. v. FTC, 436 F. Supp. 1012 (D. Del. 1977); Exxon Corp. v. FTC, 411 F. Supp. 1362 (D. Del. 1976).

The great economic cost of litigation, of which discovery is a major component,[170] brings in its wake potentially damaging social costs. Low and moderate income individuals are effectively denied access to our principal system of dispute resolution. Litigants who can penetrate that system's entry barriers experience great financial pressure to settle disputes without regard to the merits of competing claims. Even large corporate litigants are increasingly concerned with the cost of litigation. Dispute resolution for these parties has become almost exclusively a matter of business judgment. The social fabric will be worn dangerously thin if the cost of litigation leaves too many people feeling either that they cannot afford to use the machinery of civil justice, or that the burdens imposed by that machinery force them to forsake legitimate goals.

As significant as these problems are, however, they do not represent the ultimate social cost of our present discovery system that institutionalizes pressures on adversaries to limit and to distort the flow of relevant information. This cost results instead from the failure of the system to provide assurance that disputes will be resolved fairly. Adversary discovery leaves the achievement of justice in large part to chance. A system in which fairness is fortuitous invites the alienation of the people it should serve and cynicism in the professionals who run it. Popular alienation from our system of justice has been notoriously widespread for generations[171] and is the greatest single social cost of the adversary method of discovery.

The social and economic costs that result from the adversary nature of our discovery process are too high. This conclusion is compelled by the strong probability that the principal advantages that are attributed to the adversary character of this process could be preserved in large measure in an alternative system. According to Professor Rosenberg, *Hickman v. Taylor*[172] and its progeny have sought to safeguard the "integrity of the adversarial process" in the pretrial stage for two main reasons: to protect lawyers' "morale" and to "assure that both sides of the case will exert independent efforts in its preparation."[173] That the "morale" of attorneys is so fragile, so dependent on opportunities to secure unfair advantages, or so important as to outweigh society's interest in justice is not obvious. Moreover, on closer examination it appears that the Supreme Court's interest in counsel's morale is indistinguishable from the Court's interest in bilateral preparation of cases. The Court's ultimate concern is to institutionalize assurances that the process of locating and interpreting evidence will benefit from the clash of competing minds.

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[170] *See* W. Glaser, *supra* note 15, at 177-81; Rosenberg, *supra* note 91, at 480-81.

[171] For what has come to be regarded as the seminal discussion of this problem by an American lawyer, see Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 Am. L. Rev. 729 (1906).

[172] 329 U.S. 495 (1947).

It is by no means clear that preserving the extensive sway that adversarial forces enjoy under current discovery procedures is necessary to protect these concerns of the Court. The changes I propose would preserve counsel's motivation to push for full disclosure between adversaries and would leave ample room for the competitive examination and interpretation of evidence. Moreover, these changes would add, in the person of the court, a third informed perspective to the fray. This development would replace bilateral preparation with the even greater assurance of thoroughness and fairness that would result from a truly "trilateral" system.

Moreover, the suggestions offered here would leave the adversary character of civil trials fully intact. The greatest benefits of adversary litigation derive not from competitive efforts to limit and manipulate the flow of information but from dialectical evaluation of the relevant evidence. The drafters of the rules of discovery intended to leave dialectics in the courtroom; they did not expect it to play a major role in the process of collecting relevant information. It is arguable, in fact, that one of the primary goals of the proponents of the rules of discovery was to improve trial dialectics by substantially reducing the role of unfettered competition in the pretrial process. The drafters of these rules and their judicial allies seem to have realized that dialectics and Darwinism are not identical, and that the Darwinian character of trial preparation jeopardizes the attainment of dialectical truth at trial. It should be equally obvious today that the value of even the most vigorous dialectical process is necessarily limited by the data upon which that process operates. In short, the reliability of a system designed to ascertain the truth is a function of the quality of both the intellectual process employed and the information to which that process is applied. The goal of the changes I propose is to improve the scope and quality of that information. What I have tried to show is that the adversarial character of civil discovery creates intense pressures which systematically militate against the production of all the information necessary to resolve disputes fairly. If my thesis is correct, measures designed to reduce the sway of adversary forces in the pretrial arena offer the only real hope of making significant advances toward achieving discovery's two primary purposes—the ascertainment of truth and the encouragement of just settlements.

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[173] Rosenberg, *supra* note 15, at 492-93. Professor Rosenberg also refers to the latter factor as the courts' interest in "bilateral" preparation. *Id.* at 493.

To imply that implementing the kinds of changes I propose would involve neither risk nor cost would be both foolish and disingenuous. I believe, however, that there is a strong possibility that the risks and costs that would attend these changes would be greatly outweighed by a substantial reduction in both the debilitating role fortuity plays in civil litigation and in the social and economic strains imposed by current discovery procedures. What is required is a sophisticated empirical evaluation of the efficiency of the current system and of the extent to which adversary and economic pressures distort the informational package that reaches the parties and the courts.[174] If such a study demonstrates that the current system of discovery is as inefficient and disfunctional as I believe it is, then the legal community should make a major commitment to designing alternatives and to analyzing fully their economic and functional implications.

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[174] Professor Sherman Cohn of the Georgetown University Law Center has recently completed (and not yet published) a survey of local discovery rules and practices in federal district courts. While Professor Cohn's research does not address the fundamental issues described here, it contributes useful foundation information for future studies.

A major effort to study discovery in practice is also presently taking place, under the direction of William Eldridge, by the Federal Judicial Center. Thus far, the study has focused on discovery practices in six United States district courts. The first stage of the study, which was completed in June 1978, attempted to determine the extent to which discovery machinery is used. The next stage of the study plans to identify the types of cases where discovery problems are most pronounced.

Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules

Sherman L. Cohn*

I. INTRODUCTION

Traditionally, except for the limited role played by pleadings and bills of particulars, the attorney in a law court did not disclose evidentiary matters until trial.[1] "A judicial proceeding was a battle of wits rather than a search for the truth,"[2] and thus, each side was protected to a large extent against disclosure of his case until counsel chose to disclose it at trial. This philosophy changed some forty years ago with the introduction of discovery in the Federal Rules of Civil Procedure. In the words of Mr. Justice Murphy, the discovery rules meant that "civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[3] Or, as another observer saw it, "[m]odern instruments of discovery . . . together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[4]

The 1938 federal discovery rules maintained the basic premise of the adversary system. It was left to counsel to determine how to proceed in discovery matters. A matter came before a judge only when there was an objection or a failure to carry out discovery. Thus,

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This Article was written under a contract with the Federal Judicial Center, and draws upon data obtained in a survey of the federal courts conducted by the Center, noted throughout the Article. A staff paper prepared by Thad M. Guyer of the Federal Judicial Center was also a fundamental aid in the preparation of this Article. T. Guyer, Survey of Local Civil Discovery Procedures (FJC Staff Paper 77-1, 1977).

The conclusions reached and opinions expressed in this Article are solely those of the author, and are not attributable to the Federal Judicial Center.

The author wishes to express his special appreciation for the valuable assistance of Daniel R. Kane, Esq., and Keith R. Fisher, in the compilation of materials used in the Article.

[1] Although the law courts had no discovery in a sense recognizable today, an attorney could file a "bill of discovery" in an equity court for use in a law court, but the device was cumbersome. *See* Pressed Steel Car Co. v. Union Pac. R.R., 241 F. 964, 966-67 (S.D.N.Y. 1917). Equity courts did provide much more discovery. *See generally* F. James & G. Hazard, Civil Procedure 171-73 (2d ed. 1977).

[2] 8 C. Wright & A. Miller, Federal Practice and Procedure § 2001 (1969).

[3] Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[4] United States v. Proctor & Gamble Co., 356 U.S. 677, 682-83 (1958) (Douglas, J.).

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a deposition was to operate without the intervention of a judge unless the deponent or a party sought a protective order,[5] or unless a deponent failed to appear for a deposition or refused to answer a question and a sanction was requested.[6] Interrogatories were to operate extrajudicially unless an objection was made, whereupon the matter was automatically set down for court ruling.[7] Requests for documents and for physical or mental examinations were exceptions; they were to go to a judge upon motion and good cause shown.[8]

In 1970, the discovery rules were overhauled to reflect the experience of the preceding three decades.[9] One purpose was to reduce the time that judges were to spend on discovery matters.[10] Objections to interrogatories no longer go automatically to a judge for ruling, but await the interrogator's decision as to whether the objection is well taken, whether the information might be obtained by some other means, and whether the matter is important enough to warrant judicial intervention.[11] Also, the good cause requirement for motions to force the production of documents and other tangible things[12] has been replaced by a mere request of another party for the production of such items.[13] Again, a court becomes involved only when the party requesting discovery seeks an order compelling production that was refused or objected to.[14] Thus, the mold of federal discovery, particularly as recast in 1970, is to leave the discovery process to counsel. As then District Judge Kaufman observed, "the whole discovery procedure contemplates an absence of judicial intervention in the run-of-the-mill discovery attempt."[15] A court becomes involved only when a dispute arises between counsel and a motion for a protective order[16] or a request to compel discovery or for sanctions is brought.[17]

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[5] Fed. R. Civ. P. 30(b) (1938). Citations to the Federal Rules of Civil Procedure as originally enacted in 1938 are indicated by that date. Many of these have since been renumbered and otherwise altered by the amendments discussed in the text accompanying notes 9-14 *infra*.

[6] Fed. R. Civ. P. 37(a) (1938).

[7] Fed. R. Civ. P. 33 (1938).

[8] Fed. R. Civ. P. 34 (1938).

[9] *See, e.g.*, Columbia Law School Project for Effective Justice, Field Survey of Federal Pretrial Discovery (1964) (study conducted under the direction of Professor Maurice Rosenberg of Columbia Law School, referred to in the Explanatory Statement Concerning the 1970 Amendments of the Discovery Rules, United States Judicial Conference) [hereinafter cited as Field Survey].

[10] *See, e.g.*, Fed. R. Civ. P. 33(a), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 455 (1976); Fed. R. Civ. P. 34(a), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 458 (1976); Brown, *Proposed Changes to Rule 33 Interrogatories and Rule 37 Sanctions*, 11 Ariz. L. Rev. 443, 446-47 (1969).

[11] Fed. R. Civ. P. 33(a).

[12] Fed. R. Civ. P. 34 (1938).

[13] Fed. R. Civ. P. 34(b).

[14] Fed. R. Civ. P. 37(a).

[15] Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 116 (1960).

[16] Fed. R. Civ. P. 26(c).

While discovery appears to work well in the vast majority of cases,[18] serious problems have arisen. Chief Justice Burger has noted that "there is a widespread belief that pretrial procedures are being used excessively and the process is lengthening litigation."[19] In particular, he observed, "[e]xcessive use of pretrial discovery can be used as a weapon against a financially weak litigant."[20] The press has characterized discovery as being "insanely expensive and very nearly endless."[21] A task force established by the American Bar Association (ABA) as a follow-up on the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in April 1976, stated:

> Substantial criticism has been leveled at the operation of the rules of discovery.[[22]] It is alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements. Ordeal by pretrial procedures, it has been said, awaits the parties to a civil law suit.[23]

These abuses are attributed to counsel who use discovery for fishing expeditions, who roam widely under a discovery scheme that permits inquiry generally into any matter within the "subject matter involved in the pending action,"[24] who delay completion of discovery, and who force undue expense on opposing counsel by extensive interrogatories, by requests for production of unnecessarily large numbers of documents, and by production of documents in large, unorganized lots in response to interrogatories and production requests.[25]

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[17] Fed. R. Civ. P. 37.

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> The first finding we brought back from the field was that Federal discovery is on the whole working well and doing the main work it was intended to do . . . .
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> . . . [O]n the whole there is no sign of major disenchantment or disastrous malfunctioning in the pretrial discovery system as it now operates.

Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 488, 490 (1968)(commenting upon Field Survey, *supra* note 9).

[19] *How to Break Logjam in Courts*, U.S. News & World Rep., Dec. 19, 1977, at 21, 24 (interview with Chief Justice Burger).

[20] *Id.*

[21] Editorial, *Pretrial Punishment*, Bus. Week, Dec. 12, 1977, at 162.

[22] Here the task force cites to Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 202-04 (1976); Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976).

[23] ABA, Report of Pound Conference Follow-Up Task Force 27 (1976). *See* Griffin, *Discovery: A Criticism of the Practice*, 1 Forum 11, 13 (1966) (published by the ABA Section of Insurance, Negligence, and Compensation Law) ("The aim [of discovery] is admirable . . . [b]ut it has not been achieved. Open-book discovery is an albatross around the neck of the trial bar . . . .").

[24] Fed. R. Civ. P. 26(b)(1).

[25] Although an unlimited number of examples of discovery abuses could be shown, two illustrations will suffice:

As the abuses in discovery have surfaced, proposals for reform have again been made. Two major proposals for changes in the Federal Rules of Civil Procedure are those of the Advisory Committee on Civil Rules of the United States Judicial Conference,[26] and of a Special Committee for the Study of Discovery Abuse of the ABA Section of Litigation.[27] Still other proposals have emerged from a Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation.[28]

> I recall that on one occasion when we were representing a taxi company, counsel for the plaintiff served us with a printed set of interrogatories asking the defendant corporation whether it had a driver's license, where it learned to drive, whether it was married or divorced, and even asked the taxi company whether it had any children.

Savell, *Basic Use of Discovery Procedures—Some Practical Problems*, 3 FORUM 197, 199-200 (1968) (published by the ABA Section on Insurance, Negligence and Compensation Law). A similar problem was noted in Blanchard Lumber Co. v. S.S. Polyrover, 224 F. Supp. 601 (S.D.N.Y. 1963), where Judge Weinfeld described a set of 150 interrogatories as "of a drag-net nature, which not only are unduly burdensome and oppressive, but seek information irrelevant to the fundamental issue in this suit." *Id.* at 602.

Two major aspects of the problem should be noted. First, the adversary system gives a dual role to counsel. Counsel is torn between often irreconcilable obligations: to ultimate justice, in his capacity as an officer of the court, and to his client, to whom the desire for triumph is paramount even at justice's expense. It is in the defending party's interest to utilize those tactics which will cause delay or extra expense to the opponent. Conversely, it is often in the plaintiff's interest to make discovery so extensive and so expensive as to make a "good" settlement appear cheap in comparison. Second, there is the search for the proper role of the trial judge in a system overburdened with cases. As noted earlier, the philosophy of modern discovery is premised upon minimizing judicial involvement in the discovery process. Even with the current rules, however, there is a feeling on the part of some that too much judicial time is now being consumed in discovery matters. Yet, if courts are to become further involved in controlling counsel's action or inaction in the use of discovery, in order to work toward the ultimate goal of "just, speedy, and inexpensive" determination of controversies, FED. R. CIV. P. 1, more court time necessarily will have to be devoted to policing discovery.

[26] COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (Mar. 1978), *reprinted in* 77 F.R.D. 613 (1978) [hereinafter cited as 1978 PROPOSED DRAFT]. A revised draft was issued by the Advisory Committee in February 1979, *reprinted with separate pagination in* 588 F.2d (Supp. No. 2, Feb. 12, 1979) *and* 461 F. Supp. (Supp. No. 2, Feb. 12, 1979) [hereinafter cited as 1979 REVISED DRAFT].

As of this writing, the Revised Preliminary Draft is before the bar for comment. If finally adopted by the Advisory Committee on Rules and Practice to the United States Judicial Conference, and in turn by the Judicial Conference to the United States Supreme Court, the proposed change may be promulgated in early 1980. Should this timetable succeed, the effective date of any changes probably will be July 1, 1980.

[27] ABA SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (pamphlet Oct. 1977) [hereinafter cited as ABA COMMITTEE].

[28] In November 1977, Chief Judge Kaufman of the Second Circuit Court of Appeals appointed a private commission of jurists, attorneys, and legal scholars to consider proposals to "bring reason and measure to the opening rites of a trial."

Although serious attention must be paid to each of these major proposals, there is another source that should also be considered in deciding what, if any, changes in procedure should be made. Some federal district courts, and many individual judges, have used their local rulemaking authority under Rule 83 to meet perceived problems in discovery.[29] This Article examines these local attempts to limit the consumption of judicial resources, to expedite the discovery process, to curb abuses in the use of discovery methods and to provide for more effective sanctions. A comparison is made between these local practices and the reforms that have been proposed by the Advisory Committee, the ABA, and the Second Circuit Commission.

This Article is based on an examination of the local rules of the district courts[30] and an informal survey of federal district courts by the Federal Judicial Center.[31] In January 1977, questionnaires were

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Telephone Interview with Commission Secretary Robert D. Lipscher (Oct. 28, 1978). The other members of the Commission are: Hon. Irving R. Kaufman; Alan J. Hruska and Michael I. Sovern, Co-chairmen; and Hon. Arnold Bauman; Hon. Charles L. Brieant, Jr.; John Doar; Leonard Garment; James C. Goodale; Fannie J. Klein; Arthur L. Liman; James M. Nabrit, III; Hon. Edward R. Neaher; Hon. Jon O. Newman; Hon. James L. Oakes; Hon. Lawrence W. Pierce; Hon. Simon H. Rifkind; Whitney North Seymour; Hon. Harold R. Tyler, Jr.; and William E. Willis.

[29] The rule gives each court the discretionary power to "make and amend rules governing its practice not inconsistent with [the federal] rules." Fed. R. Civ. P. 83. This power is by no means a novelty, for federal courts have possessed local rulemaking power almost since the federal judiciary was first organized:

> [I]t shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.

Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335 (1793). Nor is Rule 83 unique in statutorily granting such power. "The Supreme Court and *all courts established by Act of Congress* may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court . . . ." 28 U.S.C. § 2071 (1976) (emphasis added).

For a discussion of the federal rulemaking power, see Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 Colum. L. Rev. 905 (1976). *See also* Note, *Rule 83 and the Local Federal Rules*, 67 Colum. L. Rev. 1251 (1967); Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 Duke L.J. 1011.

[30] The source used in this examination was the looseleaf service published by Callaghan & Co., updated through June 1978. Federal Local Court Rules (Callaghan 1978).

[31] Information gathered through the efforts of the Federal Judicial Center is

sent to the clerk of each federal district court. Responses were received concerning the practices of approximately ninety percent of those courts, and some follow-through inquiry has been made. Although what is reported here is not represented as a complete index of current practices, the survey has uncovered a fair sampling of current practices and should therefore be of value in solving the problems of modern federal discovery.

II. CONSUMPTION OF JUDICIAL RESOURCES IN THE DISCOVERY PROCESS

Judge time has been called "our most precious judicial resource."[32] Many district judges have attempted to conserve that resource by reducing the time they must spend in supervising the discovery process. Yet, the need to ensure that the discovery process works, that discovery does not inordinately delay the flow of litigation, and that the discovery process is not abused calls for additional investment of judge time. These competing themes are apparent both in the district judges' responses to discovery problems and in the current proposals for reform.

In 1968, Congress passed the Federal Magistrates Act,[33] as an attempt to conserve judge time. The Act authorized judges to "designate a magistrate to hear and determine any pretrial matter pending before the court" in a civil case, except for certain matters.[34]

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cited in this Article as SURVEY. References to the practices of individual judges mentioned in this Article are current with respect to the position and activities of the judges as of the time of the survey—winter 1977.

[32] Becker, *Efficient Use of Judicial Resources*, 43 F.R.D. 421, 422 (1967).

[33] Federal Magistrates Act, Pub. L. No. 90-578, tit. I, § 101, 82 Stat. 1107 (1968) (codified at 28 U.S.C. §§ 631-39 (1976)) (expanding areas in which magistrates may be used). Further expansion of permissible magistrate jurisdiction is provided in S. 1613, which passed the Senate by voice vote on July 22, 1977, 123 CONG. REC. S12647 (daily ed. July 22, 1977), and was approved for consideration by the House on September 29, 1978, 124 CONG. REC. H11181 (daily ed. Sept. 29, 1978) (consideration was granted upon adoption of House Resolution 1322). As the House version differed from that of the Senate, the bill went to a conference committee. *See* 124 CONG. REC. H11283-87 (daily ed. Oct. 2, 1978) (bill reported by the Committee of the Whole; discussion ended and no resolution made thereon). The Conference Committee made no report before the adjournment of Congress, and the bill died.

[34] 28 U.S.C. 636(b)(1)(A) (1976). The magistrate's determination of pretrial matters shall be "final," subject only to ultimate right of review by a district court judge. *See* H.R. REP. No. 1609, 94th Cong., 2d Sess. 9-10, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6162.

The exceptions to the authority of a judge to designate a magistrate to hear and determine any pretrial matter include

> a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit

Of particular note is the statutory authorization for a judge to designate a magistrate to handle discovery matters. Congress has also expressly invited the federal courts to make use of magistrates in matters short of the trial itself.[35]

The congressional invitation has not, however, met with universal acceptance. Of the 94 federal district courts surveyed, only fourteen reported that the entire court has provided for the use of magistrates in discovery proceedings through either a local rule or a general court directive.[36] In some other districts, magistrates are used in discovery matters by individual judges in the absence of a local rule or general court directive. For example, although the Southern District of New York has no local rule or general court directive providing for the use of magistrates in discovery matters, 15 of the 31 judges on the court reported making use of magistrates to assist in discovery matters.[37] Similarly, several of the fifteen judges on the District Court of the District of Columbia use magistrates for this purpose.

Where magistrates are used in discovery matters, their actual duties appear to vary. In some districts all civil discovery matters are routinely assigned to magistrates.[38] In two others, "most" civil discovery was reported to be routinely routed to magistrates.[39] In at least

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> maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b)(1)(A) (1976).

[35]
> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, . . . there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal Court.

S. REP. No. 371, 90th Cong., 1st Sess. 26 (1967).

[36] S.D. FLA. GEN. R. 25(C)(2); N.D. & S.D. IOWA MAGIS. R. 37(c)(3)(d); D. KAN. R. 36(I)(a)(1); E.D. LA. R. 20.5(a); W.D. LA. R. 28(B)-(C); E.D. MICH. R. XXVIII(c)(2)(a); D. NEB. R. 41(C)(2); D.N.H.R. 10(a); D.P.R.R. 13(B), General Order of Referral to the Magistrate; D.R.I.R. 32 (a)(2); S.D. TEX. R., 24(C)(2); E.D. WASH. R. 27. The Chief Deputy Clerk for the District of Maine notes, "In the District of Maine an attempt is made to refer most discovery pleadings to the Magistrate for resolution and not to the court." SURVEY, *supra* note 31. Judge Doyle of the Western District of Wisconsin states, "In most routine cases, the full-time Magistrate or occasionally the clerk-magistrate supervises as needed the operation of discovery." *Id.*

[37] These are Judges Bonsal, Brieant, Cannella, Carter, Duffy, Frankel, Goettel, Haight, Knapp, Lasker, Owen, Ryan, Stewart, Weinfeld, and Wyatt. *See* SURVEY, *supra* note 31.

[38] D. KAN. R. 36(I)(2); D.N.H.R. 10; N.D.N.Y.R. 43(c)(3); D.P.R.R. 13(B), General Order of Referral to the Magistrate; E.D. WASH. GEN. R. 9(d), 27(a)(7); SURVEY, *supra* note 31 (W.D. La.).

[39] These are the District of Maine and the Western District of Wisconsin. *See* SURVEY, *supra* note 31.

one district, the practice is to refer discovery matters to a magistrate only in simple cases, such as tort and contract matters, while discovery in more complex cases—such as those involving civil rights, copyright, patent, or antitrust—is reserved for direct judge supervision.[40] Even within a single jurisdiction, the practice may vary. The Southern District of New York is illustrative. Three of fifteen judges who reportedly use magistrates do so in all cases,[41] while eleven of the remaining twelve do so only when discovery is expected to be protracted, complex, or unusual, or when counsel do not cooperate with one another.[42]

When a magistrate handles discovery matters, it is generally as part of a reference of all or most pretrial matters involved in the particular case.[43] Some jurisdictions even have the magistrate handle the final pretrial order.[44] In others, the final pretrial conference and order are specifically reserved for the judge.[45]

A magistrate's decision may be reversed by the trial judge to whom the case is assigned.[46] Although some local rules and standing orders address this point, most do not. The Northern and Southern Districts of Iowa, for example, provide by local rule that a party adversely affected by an order of a magistrate may appeal to the district judge by filing a motion to review within ten days of the magistrate's order.[47] Former District Judge Frankel of the Southern District of New York limited the right to judicial review by providing that magistrates' discovery orders are final unless appealed within ten days.[48] Of course, a court always has the inherent power to make an exception in order to review a magistrate's ruling in the interest of justice, no matter how final the local rule or standing order attempts to make the magistrate's order.[49]

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[40] This is the District of Maine. *See* Survey, *supra* note 31.

[41] These are Judges Carter, Stewart, and Wyatt. *Id.*

[42] These are Judges Bonsal, Brieant, Cannella, Duffy, Geottel, Haight, Knapp, Lasker, Owen, Ryan, and Weinfeld. *Id.* Judge Frankel, however, refers all but complex and protracted cases to a magistrate. *Id.*

[43] *See, e.g.*, D.P.R.R. 13(B), General Order of Referral to the Magistrate.

[44] *See, e.g.*, U.S. Magis. R. 1(f)(1); D. Alaska Gen. R. 30(e)(2); D. Conn. R. 11(e); D.D.C.R. 3-8(b).

[45] *See, e.g.*, D.N.H.R. 10(b).

[46] *See* note 34 *supra*.

[47] N.D. & S.D. Iowa Magis. R. 37(C)(3). A similar rule, providing only a five-day limit, is E.D. La. R. 20.11(a).

[48] Under Judge Frankel's standing order, in all but unusual civil cases, counsel are ordered that pursuant to 28 U.S.C. § 636(b)(1)(A) (1976), a magistrate's decision on discovery motions "shall become final unless within ten (10) days following issuance of such decision, a motion is made for review upon the asserted ground that the Magistrate's order is clearly erroneous or contrary to law." Survey, *supra* note 31.

[49] H.R. Rep. No. 1609, 94th Cong., 2d Sess. 8-10, *reprinted in* [1976] U.S. Code

Thus, various district judges have used magistrates in an attempt to reduce the drain on judge time occasioned by the discovery process. While use of magistrates is undoubtedly cheaper than the use of federal district judges,[50] there clearly is a cost in terms of salaries, support staff, space, and other factors. The Second Circuit Commission has, however, proposed an experiment which, if successful, would furnish additional judicial resources at no direct cost to the federal budget. The Commission proposed in April 1978 that a pilot project be undertaken in the Southern District of New York to use attorneys to serve, without compensation, as "volunteer masters" in civil cases.[51] The volunteer master would convene a meeting of counsel or the parties early in the case. The master would analyze the pleadings and other papers, review the pertinent documentary materials, explore the possibility of mediating and settling the controversy, assist the parties in the preparation of a statement of the issues that appear to be involved, seek to clarify and narrow those issues, seek stipulation of facts on which the parties agree at that stage, and endeavor to work out with the parties a plan of discovery. At the termination of these proceedings, the volunteer master would make a written report to the trial judge on the matters agreed upon and those on which agreement could not be reached.

Certainly such a system, if successful, would aid the discovery

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Cong. & Ad. News 6162. *See* Mathews v. Weber, 423 U.S. 261, 270-71 (1976). *See generally* Sear, *Proceedings of Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 89, 254 (1976).

[50] Increasing the number of magistrates is also a somewhat easier task. Their number may be increased, and magistrates assigned to specific federal districts, by the United States Judicial Conference under 28 U.S.C. § 633(b)-(c) (1970). Although Congress exercises ultimate control over magistrates' appointments through the appropriation process, this method is undoubtedly more expeditious than authorizing the creation of additional federal district judgeships.

[51] The Commission stated:

> The Commission is mindful of the fact that at the very time the courts are obliged to devote a progressively larger portion of their efforts to criminal litigation, there have been substantial increases in the number, magnitude and complexity of civil suits. Less judicial time spent on civil litigation means less judicial control, lengthening delays, burgeoning expenses, fewer opportunities for mediation and settlement—in a highly practical sense, diminished access to the court for litigants who cannot afford these burdens, expenses and delays.
>
> There is a considerable possibility that these problems could be alleviated if a large number of highly qualified trial lawyers were brought into the system to perform a variety of para-judicial functions. One means of gauging whether such volunteer masters could effectively and fairly discharge responsibilities of this nature would be to try the program on a small, experimental scale.

Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, Volunteer Masters Pilot Program (Apr. 10, 1978) (unpublished report).

process. By narrowing and defining disputed issues at a preliminary stage, and by stipulating as to facts on which there clearly is no disagreement, the amount of discovery needed would be reduced. Moreover, the Second Circuit Commission proposal is intriguing in allowing for greater involvement of the bar in policing itself, as well as for its potential of furnishing additional resources at little or no cost to the taxpayer. There is no reason, however, why these tasks could not now be assigned to magistrates. But no evidence was uncovered in the Survey that any district judge—including those who are members of the Commission—is now using magistrates in the manner suggested by the Commission.

Another device used by district courts to conserve judicial time is a requirement that, before a discovery motion is filed, counsel must confer and attempt to resolve the problem. Fifty-five of the 94 federal districts have adopted rules requiring that an attorney making a discovery motion must first attempt to resolve the discovery problems without court intervention.[52] These rules vary from court to court. Some consist of merely a requirement that counsel confer in an attempt to resolve differences prior to submission of a discovery motion or prior to a hearing on that motion.[53] Other courts require a comprehensive certification or affidavit to the court. The local rule of the District of Puerto Rico is illustrative:

> With respect to all motions and objections relating to discovery . . . counsel for each of the parties shall meet and confer in advance of the hearing in a good faith effort to narrow the areas of disagreement to the greatest possible extent. It shall be the responsibility of counsel for the movant to arrange for the conference. To curtail undue delay in the administration of justice, this Court hereinafter refuses to hear any and all motions for discovery and production of documents unless moving counsel shall first advise the Court, in writing, that after personal consultation and attempts to resolve

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[52] D. Ariz. Civ. R. 42(A)(2)[b]; C.D. Calif. R. 3(l); E.D. Calif. Civ. R. 114(c); N.D. Calif. Civ. R. 230(4); S.D. Calif. R. 3(e)9; D. Colo. R. 5(g); M.D. Fla. Gen. R. 3.04(a); N.D. Fla. Gen. R. 8(A); S.D. Fla. Gen. R. 10(I)(2); N.D. Ga. R. 91.62; E.D. Ill. R. 4(e); N.D. Ill. Gen. R. 12(d); S.D. Ill. R. 11; N.D. Ind. R. 7(e); S.D. Ind. R. 11; N.D. & S.D. Iowa Civ. R. 16(E); E.D. La. R. 3.11; M.D. La. Gen. R. 5(D); W.D. La. R. 10(l); D. Me. R. 15(b); D. Md. Gen. R. 34; D. Mass. R. 15(e); E.D. Mich. R. IX(k); D. Minn. R. 5; E.D. Mo. R. VII(c)(5); D. Neb. R. 20(J); D. Nev. Civ. R. 17(A)(4)(b); D.N.H.R. 14(c); D.N.J. Gen. R. 12(G); D.N.M.R. 10(c); E.D.N.Y. Gen. R. 9(f); S.D.N.Y. Gen. R. 9(f); N.D.N.Y. Gen. R. 46; M.D.N.C. Civ. R. 21(k); W.D.N.C. Gen. R. 8(A); D.N.D.R. IV(F)(3); N.D. Ohio Civ. R. 3(d)(6); S.D. Ohio R. 3.7.1; N.D. Okla. R. 14(d); W.D. Okla. R. 13(d); D. Ore. Civ. R. 12(b); E.D. Pa. R. 25(d); M.D. Pa. R. 301.02(e); W.D. Pa. R. 4(a)(2); D.P.R.R. 8(M); D.R.I.R. 13(e); W.D. Tenn. R. 9(d); S.D. Tex. R. 16(G); W.D. Tex. R. 14(n); E.D. Va. R. 11(K); E.D. Wash. Gen. R. 9(b); W.D. Wash. Civ. R. CR 37(g), (h); E.D. Wis. R. 6, § 6.02; W.D. Wis. R. 8(d).

[53] *See, e.g.*, D. Me. R. 16; E.D. Mich. R. IX(k); S.D. Ohio R. 3.7.

> differences, counsel are unable to reach an accord. This statement shall recite, in addition, the date, time and place of such conference, and the names of all parties participating therein.[54]

The local rules requiring counsel to consult do not seem to be wholly successful. Some courts have found it necessary, upon the filing of a discovery motion, automatically to mail a form order directing counsel to meet in advance of the hearing and to confer in a good faith effort to settle all objections and opposed matters.[55] Other courts routinely send a memorandum to counsel, detailing the court's philosophy that counsel are to work discovery matters out on their own.[56] One district judge, moreover, despite the existence of a local rule requiring counsel to confer and to certify to the court that the conference has taken place,[57] has found it necessary to notify counsel in civil actions that 25% of all motions filed in civil cases in that division involve discovery controversies, to admonish counsel that most of these disputes could have been avoided by a realistic attitude toward discovery, and to insist that counsel cooperate to prevent a waste of the court's time.[58]

It is noteworthy that both the ABA Committee and the Advisory Committee, in proposing a discovery conference procedure, require that a request for such a conference be accompanied by a statement that requesting counsel has made "a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the request" for the conference.[59] In both proposals, as well, there are explicit provisions permitting the imposition of sanctions for failure

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54. D.P.R.R. 8(M). *See also* D. Ariz. Civ. R. 42(2)[b]; C.D. Cal. R. 3(k).

55. *See, e.g.*, E.D. Mich. R. IX(k), and the standing order of Judge Pratt ordering counsel to meet and stipulate whatever issues remain in dispute, as required by local rule IX(k). This order is sent whenever a motion relating to discovery is filed. *See* Survey, *supra* note 31.

56. These districts include the Central District of California, the Eastern District of Louisiana, and the Western District of Pennsylvania. *See* Survey, *supra* note 31. The California memo quotes from Hickman v. Taylor, 329 U.S. 495, 507-08 (1947):

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever he has in his possession.

57. S.D. Fla. Gen. R. 10(I)(2).

58. Chief Judge C. Clyde Atkins, Southern District of Florida, "Notice to Counsel." *See* Survey, *supra* note 31.

59. 1979 Revised Draft, *supra* note 26, at 3 (proposal for new Federal Rule of Civil Procedure 26(f)(5)). The ABA Committee proposal for new Federal Rule of Civil Procedure 26(c)(5) requires "a certification that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request." ABA Committee, *supra* note 27, at 4.

to confer in a good faith effort to reach agreement.[60] It appears, however, that no court has imposed a sanction for failure to confer in good faith prior to taking a discovery matter to court as required by local rules. Perhaps the committee proposals, if adopted, may lead to serious attempts to reduce the burden of what one judge has termed "silly discovery motions."[61] Past experience, however, must lead to some skepticism. Only further experience will tell.

III. ENCOURAGING COUNSEL TO BEGIN AND TO TERMINATE DISCOVERY AS EXPEDITIOUSLY AS POSSIBLE

A frequent criticism of discovery is that it drags on for an inordinate amount of time. When one considers that, in at least one district, the median time for substantial completion of discovery is 434 days for an average of only 5.4 discovery requests per case, there appears to be some objective basis for this criticism.[62] The Federal

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[60] *See* ABA Committee, *supra* note 27, at 23-25 (proposal for new Federal Rule 37(e)); 1979 Revised Draft, *supra* note 26, at 19 (Advisory Committee proposal for same). The ABA version makes explicit reference to 28 U.S.C. § 1927 (1976), which now provides a basis for a personal cost sanction against counsel. The Advisory Committee proposal provides for a personal cost sanction against a party or counsel without a reference to 28 U.S.C. § 1927.

[61] Survey, *supra* note 31 (note of Judge Grady, N.D. Illinois).

[62] The validity of the criticism that discovery consumes an inordinate amount of time has been challenged by a recent study, at least as the criticism applies to ordinary litigation. This conclusion results from a Federal Judicial Center study of approximately 500 cases from each of six metropolitan federal districts: Central District of California, Southern District of Florida, Eastern District of Louisiana, District of Maryland, District of Massachusetts, and Eastern District of Pennsylvania. Each case selected had been terminated during fiscal 1975. Federal Judicial Center, Case Management and Court Management in United States District Courts 18 (1977) (part of the District Court Study Series) [hereinafter cited as Case Management Study].

Examining some 890 cases filed in these federal districts, the study revealed that of those cases in which discovery was substantially completed before the case was terminated, an average of only 6.26 discovery requests were made. *Id.* at 26, table 11. The average number of discovery requests per case varied from 4.48 in the Eastern District of Louisiana, to 8.61 in the Southern District of Florida. Discovery requests included *all* depositions, interrogatories, requests for admission, requests for production of documents, and motions for physical or mental examination noticed or made by all parties; it did not include informal discovery. *Id.* The study concluded:

> [A]ll the figures on discovery events per case are remarkably small, considering the widespread perception that federal civil discovery has gotten out of hand and become "a rich man's tool." A maximum of 8.61 discovery initiatives per completed case . . . hardly seems excessive, especially since this is a total of initiatives by all parties. . . . [F]igures in the ranges shown suggest that relatively little needless discovery is conducted in the typical case. Of course it is quite possible that a large volume of needless discovery is conducted in a small number of complex or protracted cases, a possibility entirely consistent with these figures.

Id. at 27 (footnote omitted).

Rules of Civil Procedure, moreover, do not set forth any time limit within which discovery procedures must begin and end, leaving this question to the individual courts and judges. In the "hope of assuring that discovery is completed in what they consider a timely fashion,"[63] a majority of district courts have adopted local rules prescribing almost automatic time limits on discovery.

One third of the federal districts calculate a time limit on discovery from the occurrence of an event. Most of these, some nineteen districts, use the joinder of issue—the filing of an answer—as the moment at which discovery time begins to run. Eight of those districts specify that all discovery is to be completed within three months of joinder of issue.[64] Other courts place the cutoff time at four months,[65] five months,[66] and two at six months,[67] from issue. Some of these courts provide expressly for a longer time period for certain complex cases, including patent, antitrust, and trademark cases.[68]

At least ten districts now provide for a "preliminary"[69] or "initial"[70] pretrial conference to be held early in the litigation process.[71] One of these districts, the Eastern District of Pennsylvania,

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Yet, there is a perceived need to move discovery along so that cases are ready for trial at an earlier date, and the study does indicate that some efforts on this behalf produce results. The study found that the interval between filing of the complaint and the substantial completion of discovery varied from 182 days in the Southern District of Florida, to 434 days in the District of Massachusetts; the average interval being 306.3 days. *Id.* at 26. This wide divergence indicates the utility of a survey of local practices.

[63] *Id.* at 25.

[64] *See, e.g.*, S.D. Miss. R. 11; W.D.N.C.R. 10; D.N.J. Gen. R. 15(A); D.N.D.R. IV(F)(1); W.D. Tex. R. 26(e); Case Management Study, *supra* note 62, at 41 (New Mexico District Court judge); Survey, *supra* note 31 (Judge Stafford's standing order in the Northern District of Florida).

[65] N.D. Ga. R. 181-11; S.D. Ga. R. 7.1; D. Kan. R. 17(a); E.D.N.C. Civ. R. 7(E); S.D. Tex. R. 15(e); N.D.W. Va. Civ. R. 2.06(b).

[66] N.D. Ind. R. 12(d); W.D. Mo. R. 20(D)(1); D. Nev. Civ. R. 17(A)(2)(a).

[67] M.D. Pa. R. 301.07; D.P.R.R. 7.

[68] *See, e.g.*, N.D. Ind. R. 12(d); E.D.N.C. Civ. R. 7(E); S.D. Tex. R. 15(E); W.D. Tex. R. 26(e). *See also* M.D.N.C. Civ. R. 22(h).

[69] *E.g.*, E.D. Ill. R. 9(b).

[70] *E.g.*, S.D. Ind. R. 19(d).

[71] In addition to the Eastern District of Illinois and Southern District of Indiana, the following local rules provide for such pretrial conferences: N.D. & S.D. Iowa Civ. R. 18(A)(1); D. Mont. R. 11(b); M.D.N.C. Civ. R. 22(a)-(d); D.N.H.R. 10(a); N.D. Ohio Civ. R. 17; E.D. Pa. R. 7(b); E.D. Va. R. 12(3). This is also the practice of Judges Boyle, Cassibry, Rubin, Schwartz, Sear, and West in the Eastern District of Louisiana. Survey, *supra* note 31. Although the local rule for the District of Maryland makes no such provision and the Survey did not uncover a general directive on the matter, the Federal Judicial Center study results show that all judges on the District Court of Maryland have such a conference. *See* Case Management Study, *supra* note 62, at 21. In addition, some courts encourage counsel to meet at an early discovery conference. *See, e.g.*, W.D. Tenn. R. 9(a).

provides that this initial pretrial conference be held within 45 days following the filing of the complaint.[72] Two districts require that the initial pretrial conference be held not more than sixty days after the filing of the answer.[73] The other seven districts provide for an initial pretrial hearing, but no mandatory time for that conference is set forth. In each instance, the principal purpose of the preliminary or initial pretrial conference is to establish a schedule for discovery, including a time for its completion. This pretrial conference culminates in a court order containing such a schedule. Some districts follow a variation of this procedure. Without requiring a preliminary pretrial conference, they provide that the court shall issue an order setting a date by which all discovery is to be completed.[74]

Another popular approach is to permit the continuation of discovery until the occurrence of a particular event. In at least fourteen districts, discovery may continue until the time of the pretrial conference.[75] In two others, discovery may continue until the pretrial order

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[72] E.D. Pa. R. 7(b).

[73] N.D. & S.D. Iowa Civ. R. 18(A)(1); D.N.H.R. 10(a). The Districts of Iowa have adopted a standard pretrial order to be issued by the clerk "forthwith" upon the joining of issue, directing counsel to meet within sixty days of issue and to reach agreement as to many specific items in an attached check list. One of those items is an estimated date of completion of discovery. Within ten days after this preliminary pretrial conference, counsel are to submit a report to the clerk setting forth its results. Upon receipt of this report, the clerk issues a second standard pretrial order directing the completion of discovery by a day certain.

[74] *See, e.g.*, N.D. Miss. Civ. R. C-10(h). Other districts provide for an order to be entered by the court or magistrate, or a letter of notification from the clerk, as to when discovery is to be completed. *See, e.g.*, D. Neb. R. 25(A)(4) (providing that as soon as is practical after filing of a civil suit, the court "with or without consultation with counsel" may issue such an order); D. Nev. Civ. R. 17(A); D.N.H.R. 10(a).

The "Rules of Practice" of Judge Mahon of the Northern District of Texas provide that, within "about 10 days" after issue has been joined, the court will enter an order setting a date for the completion of discovery. The Rules set forth that "in the normal case" that date will be "approximately six months" after issue is joined. That order will also set a date for a final pretrial conference and for trial, which "in the normal case" will be eight months after issue. *See* Survey, *supra* note 31.

[75] *See* E.D. & W.D. Ark. R. 9(e); C.D. Cal. R. 9(c); S.D. Cal. R. 9(d); D. Conn. R. 11(a); D. Del. R. 11(A); D. Idaho R. 10(c); W.D. La. R. 23(h)(3); D. Me. R. 21; D. Md. Supp. R. 35(b); E.D. Okla. R. 17(b); N.D. Okla. R. 17(b); W.D. Okla. R. 16(b); E.D. Tenn. R. 9(c).

> Eastern District of California Rule 103(b) is a slight variation on this theme: Any party who is ready to proceed to pre-trial conference and trial may serve and file a motion to have the case set for pre-trial conference or for trial, or both. Said motion shall be accompanied by a Certificate of Readiness stating that:
>
> . . . .
>
> (2) The party has completed all desired depositions, other discovery and pre-trial motions, except specified discovery or motions, if any, which could

is entered,[76] although ordinarily that will occur on the day of the pretrial conference. A variation on this theme is found in the Western District of Pennsylvania. There, in all cases involving personal injuries, pretrial is "invoked" by a written notice from a judge or from a clerk of the court. All discovery is to be completed within fifty days "after pretrial has been invoked."[77] The Southern District of Florida provides that discovery is to be completed no later than five days prior to the date of the pretrial conference.[78] The Middle District of Florida provides for the completion of discovery before counsel are to meet to confer regarding pretrial, which is ordinarily ten days before the pretrial conference.[79] Finally, in some districts providing for termination of discovery prior to pretrial, the pretrial conference is set automatically. For example, the Central District of California provides that the pretrial shall be scheduled approximately sixty days after joinder of issue,[80] and that all discovery shall be completed prior to the pretrial conference.[81]

One might assume that the existence of a rule or court policy requiring early preliminary conferences or setting deadlines for discovery would be enough to ensure that discovery is concluded in a timely fashion. This assumption is, however, open to question. The median time for the completion of discovery in the Southern District of Florida, for example, which does not require a preliminary pretrial conference[82] and which permits discovery to continue until five days before final pretrial,[83] is only 182 days.[84] In contrast, the median time for the completion of discovery in the Eastern District of Pennsylvania, which requires a preliminary pretrial conference to be held within 45 days of the filing of the complaint,[85] is 305 days.[86] The

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not have been completed in the exercise of due diligence.
E.D. Cal. Civ. R. 103(b).

[76] *See* D.D.C. Civ. R. 1-15(d); Survey, *supra* note 31 (District of Vermont).

[77] W.D. Pa. R. 5(II)(C)(1). The rule applies explicitly to "civil cases involving personal injuries . . . ." While Rule 5(II)(A) provides that there will be pretrial "on every civil case," unless a court otherwise orders, the point at which discovery is to terminate in civil cases not involving personal injury is not clear from the local rules.

[78] S.D. Fla. Gen. R. 14(F).

[79] M.D. Fla. Gen. R. 3.05(b), 3.06(b). Rule 3.06(b) provides that in some cases counsel may be ordered to meet to prepare a pretrial stipulation without a pretrial conference.

[80] C.D. Cal. R. 9(a).

[81] C.D. Cal. R. 9(b)(3).

[82] S.D. Fla. Gen. R. 14(F).

[83] *Id.*

[84] *See* Case Management Study, *supra* note 62, at 26, Table 11 (considering 96 cases).

[85] E.D. Pa. R. 7(b).

[86] *See* Case Management Study, *supra* note 62, at 26, Table 11 (considering 194 cases).

longest median time for completion of discovery, 434 days, is found in the District of Massachusetts,[87] which permits discovery to continue for up to two years after issue is joined.[88] The wide range of median discovery time strongly suggests that it is exercise of court control over discovery, rather than the existence of a court rule, that determines the length of discovery.[89]

One cannot say, of course, that a prolonged discovery period is bad. Those cases that are ordinarily thought of as complex—antitrust, securities fraud, stockholders' derivative, patents, products liability—may require longer discovery periods. Even in simpler cases, there are circumstances that make exceptional treatment appropriate.[90] To retain the necessary flexibility, courts have

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[87] *See id.* (considering 154 cases).

[88] The District of Massachusetts has no local rule or standing order of the district governing this point. Operating on an individual calendar basis, each judge follows his own procedure. At least three of the six active judges send out pretrial orders specifying that all discovery is to be completed within six months after issue is joined. But because the district has a tremendous backlog of cases—caused by a series of long-term vacancies in the past decade plus the tremendous time that Judge Garrity has had to put in on the Boston School case and a few other big cases—for most of the judges, civil trials are long delayed. For this reason, extensions and continuances of discovery completion deadlines are liberally granted by at least three of the judges. For one, discovery completion two years after issue has been joined is now considered typical. *See* SURVEY, *supra* note 31.

[89] It is of interest to note the method of control exercised by the Southern District of Florida, which enjoyed the shortest period for discovery of any district studied by the Federal Judicial Center. *See* text accompanying notes 82-83 *supra*. At a median time of 18 days after answer, a notice is sent out to counsel scheduling a pretrial conference in preparation for trial. *See* CASE MANAGEMENT STUDY, *supra* note 62, at 20, 35, Table 21 (considering 250 cases). This conference is often set some 30 to 45 days later and rarely more than 90 days later. *Id.* at 20. As noted earlier, note 78 *supra* and accompanying text, discovery in Southern Florida is to terminate five days before pretrial. S.D. FLA. GEN. R. 14(F). This appears to be effective for at approximately the time that the pretrial conference is set, the trial date is also set. *See* CASE MANAGEMENT STUDY, *supra* note 62, at 34, Table 20. And the Southern District of Florida grants few continuances. *See id.* at 36.

In contrast, the Central District of California, which similarly sets an early final pretrial conference and requires that discovery be completed by the time of the conference, sets the trial date at the time of the pretrial conference. *See id.* at 34. The district is also very liberal with continuances. *See id.* at 36-37. The result appears to be reflected in the contrast in median time for disposition of all civil cases, whether tried or not—seven months in Central California and four months in Southern Florida, *id.* at 2, Table 1—and in the median time to go to trial—476 days in Central California and 254 days in Southern Florida. *Id.* at 34, Table 20.

[90] The Fourth Circuit has emphasized the need for latitude in establishing and maintaining timetables for the discovery process:

> A set rule limiting the time within which pretrial discovery may be had may be appropriate for routine cases, indeed, for most cases. The exceptional case requires different treatment, however, and the spirit of the rules does not require that completeness in the exposure of the issues in the pretrial discov-

been given the power to terminate discovery at an earlier date than that provided for in the local rule[91] or to extend that time. The local rules often provide for such an extension "for good cause shown,"[92] "to prevent manifest injustice,"[93] or "for valid cause shown to exist beyond the control of litigants or counsel."[94] One court states that additional time will be allowed only "[i]n the exceptionally difficult case."[95] Another insists that for an extension there must be "a factual showing that the moving party has diligently pursued discovery during the period originally specified."[96] Some courts, while not providing explicitly for the power to extend the time for discovery, permit a trial judge to exercise a broad, general authority in a specific case to modify the application of any local rule "to meet emergencies or to avoid injustice or great hardship."[97] While many of the court rules contain no explicit statement that the courts retain the power to extend the time for discovery beyond that provided by the local rule, there can be no doubt of the inherent power to do so.[98]

In practice, many judges refuse to adhere blindly to discovery limitations imposed by court rules, preferring to focus upon the peculiar requirements of each case and varying their approach accordingly; close supervision and control, and hence individual treatment, is exercised through conferences with counsel, status calls, and motion hearings.[99] The practice of a judge of the District of Columbia—where the order and pretrial are set by the judge and the discovery cutoff is at the time of pretrial—is illustrative: he examines all of his civil cases in detail every three or four months, singling out those in which he finds counsel may be delinquent, and setting those cases

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> ery proceedings be sacrificed to speed in reaching the ultimate trial on the merits. Delay should be avoided to the extent that it is unnecessary or unreasonable but adequate time must be allowed for discovery of the facts and assembly of the proof.

Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966).

[91] Some courts expressly recognize this power. *See, e.g.*, M.D. FLA. GEN. R. 3.05(a).

[92] S.D. FLA. GEN. R. 14(F).

[93] E.D. & W.D. ARK. R. 9(e).

[94] N.D. & S.D. IOWA CIV. R. 18(B)(2). This rule adds that for such an extension the case must require an "extraordinary pre-trial record." *Id.*

[95] W.D.N.C. GEN. R. 10.

[96] S.D. IND. GEN. R. 19(g).

[97] D. KAN. R. 3; *see* D. ME. R. 1(c); D.N.M.R. 34.

[98] Indeed, some appellate courts have read local rule time requirements as providing only a guideline for a case-by-case approach, holding that the rule is not dispositive in itself, but dependent upon final determination by the trial judge on each case's peculiar facts. *See* Bardin v. Mondon, 298 F.2d 235 (2d Cir. 1961); Sykes v. United States, 290 F.2d 555 (9th Cir. 1961); Hayden v. Chalfant Press, Inc., 281 F.2d 543 (9th Cir. 1960); Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses, 96 F.2d 30 (8th Cir. 1938).

[99] *See* SURVEY, *supra* note 31 (Judge Matsch of the District Court of Colorado).

for a status call. At that meeting, he ascertains the additional time that each side reasonably needs to complete discovery in light of the particular case, and he orders discovery to terminate on a day certain.[100]

The three major proposals now before the bar also address the problem of prolonged discovery. Both the Advisory Committee and the ABA Committee propose an amendment to the Federal Rules to make it mandatory for a district court, upon the request of any party, to hold a preliminary pretrial "discovery conference."[101] When a request is made for a discovery conference, counsel is to submit a statement of the issues as they appear at that time, a plan and schedule of discovery, and limitations upon discovery that counsel then believes to be necessary or appropriate.[102] Opposing counsel would have ten days to make additions and objections,[103] and the conference would follow. The ABA Committee urges that this conference be presided over by the trial judge "so that he participates in the early definition of issues."[104] The discovery conference is to terminate in an order identifying the issues, establishing a plan and schedule of discovery, setting limitations on discovery, and determining other pertinent matters.[105] Significantly, the proposed new Rule requires that the party requesting the discovery conference must also furnish the court with a statement that he "has made a reasonable effort to reach agreement with opposing attorneys on the matter set forth in the request."[106] The Advisory Committee has stated that "it is not contemplated that requests for discovery conferences will be made routinely," but that the matter will ordinarily be resolved by counsel conferring with each other.[107] The ABA Committee agrees that the discovery conference with the court should "be the exception rather than the rule"; in the "great majority of the cases" agreement is expected to be reached by counsel without judicial intervention.[108]

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[100] *Id.* (notes accompanying questionnaire of Judge George L. Hart, Jr., of the District Court of the District of Columbia).

[101] *See* ABA Committee, *supra* note 27, at 4-7 (proposed Rule 26(c)); 1979 Revised Draft, *supra* note 26, at 3-4 (Advisory Committee proposed Rule 26(f)). The Advisory Committee also makes explicit the present inherent power of a court to call such a conference without a request by counsel.

[102] *See* sources cited at note 101 *supra*.

[103] *See id.*

[104] ABA Committee, *supra* note 27, at 5-7 (Comments to proposed Rule 26(c)).

[105] *See* 1979 Revised Draft, *supra* note 26, at 3-4 (Advisory Committee proposed Rule 26(f)); ABA Committee, *supra* note 27, at 4 (proposed Rule 26(c)). The ABA Committee Comments to proposed new Rule 26(c) are quite specific on the contemplated contents regarding discovery:

> The conference will produce an order defining: (a) a "plan" in which the types and subjects of discovery are set forth, *e.g.*, oral depositions of A, B and C; production of contracts and any letters, correspondence or memoranda explaining or modifying them, etc.; (b) a "schedule" for discovery which specifies the time and place for discovery events, *e.g.*, the dates and places for the taking of depositions of A, B and C, or the time within which documents are to be produced; and (c) such "limitations" as might otherwise be employed in protective orders, *e.g.*, the documents of C shall be disclosed only to B's lawyers.

Id. at 6.

[106] 1979 Revised Draft, *supra* note 26, at 3 (Advisory Committee proposed Rule 26(f)(5)).

The Survey indicates that a procedure similar to that proposed by the Advisory Committee and the ABA Committee has been in effect in at least ten districts.[109] In those districts, the conference is mandatory in every civil case. The rules concerning the purpose of the conference are often more general than the provisions of the proposed new Federal Rule. But that is not always the case. In the Northern and Southern Districts of Iowa, for example, the rule is supplemented by a detailed form order and check list automatically sent out by the court.[110]

As previously suggested, however,[111] having a rule on the books is not an answer in itself. There must be an intent on the part of the judge to manage a case (either personally or through a magistrate) in order to bring about as speedy, efficient, and inexpensive completion of discovery as possible. When there is such interest, a rule is unnecessary; where there is no such interest, a rule is no help. Where the district judges have felt that the requirement of a discovery conference would be helpful, they have already so provided by local rule or by standing orders or general practices of individual judges.

IV. PREVENTING DISCOVERY ABUSE AND BRINGING MORE EFFICIENCY TO DISCOVERY DEVICES

The line between proper, even properly aggressive, use of discovery and its abuse is difficult to draw. "Perhaps [abuse of discovery] is like pornography—it is very easy to recognize, but it is awfully hard to define."[112] Yet, certain problems with the use of discovery have been identified and solutions have been proferred. Some concern perceived abuse of the process. Others involve situations in which the process is seen to be less efficient, or more expensive, than it might be.

This section of the Article examines the local rules of various district courts and the directives, standing orders, and practices of individual judges for their solutions to these problems. First, the general scope of discovery is discussed, each of the discovery devices is examined individually, and the courts' filing requirements are studied. Second, comparison is made with the major proposals for Federal Rule changes now before the bar.

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[107] *See id.* at 5 (Advisory Committee Note to proposed Rule 26(f)).

[108] *See* ABA COMMITTEE, *supra* note 27, at 4 (Comments to proposed Rule 26(c)).

[109] *See* note 71 *supra*.

[110] *See* note 73 *supra*.

[111] *See* text at notes 82-89 *supra*.

[112] Meeting of the Metropolitan Chief Judges Conference (Apr. 19, 1976) (transcript) (comment of unidentified judge).

A. SCOPE OF DISCOVERY

The scope of permissible discovery is now set forth in Federal Rule 26(b)(1) as "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[113] This Rule has been criticized because "sweeping and abusive discovery is encouraged by permitting discovery confined only by the 'subject matter' of a case . . . rather than limiting it to the 'issues' presented."[114] The Supreme Court has, in addition, done little to restrict the reach of Federal Rule 26(b)(1):

> The key phrase in this definition—"relevant to the subject matter involved in the pending action"—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).[[115]] Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. *Hickman v. Taylor*, *supra*, at 500-501. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.[116]

Since the local rules adopted by the district courts may not be inconsistent with the Federal Rules,[117] it is not surprising that there

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[113] FED. R. CIV. R. 26(b)(1).

[114] ABA COMMITTEE, *supra* note 27, at 2-3 (Comments to proposed Rule 26(b)(1)). The Committee Comments go on to explain: "For example, the present Rule may allow inquiry into the practices of an entire business or industry upon the ground that the business or industry is the 'subject matter' of an action, even though only specified industry practices raise the 'issues' in the case." *Id.* at 3.

[115] In a footnote, the Court quoted Professor Moore's treatise on Federal Practice: "[T]he court should and ordinarily does interpret 'relevant' very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation." Oppenheimer Fund, Inc. v. Sanders, 98 S. Ct. 2380, 2389 n.12 (1978), *quoting* 4 MOORE'S FEDERAL PRACTICE ¶ 26.56[1], at 26-131 n.34 (2d ed. 1976).

[116] Oppenheimer Fund, Inc. v. Sanders, 98 S. Ct. 2380, 2389-90 (1978) (footnote omitted).

[117] Federal Rule 83 allows district courts to "make and amend rules governing its practice *not inconsistent* with these rules." FED. R. CIV. P. 83 (emphasis added). A commentator has noted:

> The intention of the Committee was to provide a simple, unified system which would be governed by a single, brief body of rules. The Federal Rules of Civil Procedure do not, however, cover all situations. To the extent that the new rules, together with the federal statutes, do not regulate the practice

are no local rules reducing the scope of permissible discovery. Yet, whenever a challenge to relevancy of inquiry is made, a parameter must be drawn. And as pleadings come in, as facts are stipulated or otherwise admitted, as discovery progresses, it becomes possible to define to a greater extent the issues that are or may be in the case. Experience with this limiting process has occurred in complex litigation. The *Manual for Complex Litigation* has been promulgated,[118] setting forth certain procedures as guidelines to be followed in complex litigation.[119] The *Manual* contains a suggestion for a series of pretrial conferences,[120] and a recommendation that at the second conference an attempt be made to establish "limits" on the "subject matter for the remaining discovery on the merits" in order "to keep discovery within the bounds of reason and relevancy . . . ."[121]

Picking up on this theme, the North District of Ohio has established a procedure for limiting issues for discovery in complex cases. That court has promulgated rules for complex litigation as a part of its local rules,[122] and has provided that in these cases discovery is to be "confined to the genuine issues necessary to a decision of the case."[123] Within 180 days after issue is joined, counsel is to submit tentative statements "explaining and clarifying the positions taken in the pleadings."[124] A pretrial conference is to follow for the purpose

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and procedure, the district courts are permitted to formulate their own rules. Hopkinson, *The New Federal Rules of Civil Procedure Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159, 160 (1939). *See generally* note 29 *supra*.

[118] JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MANUAL FOR COMPLEX LITIGATION (rev. ed. 1977 & Supp. 1978) [hereinafter cited as MANUAL]. The *Manual* which is continually revised, is published as 1 Pt. 2 MOORE'S FEDERAL PRACTICE (1978) and as a supplementary pamphlet to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1977 & Supp. 1978).

[119] "Complex litigation" is defined as "one or two or more related cases which present unusual problems and which require extraordinary treatment, including but not limited to the cases designated as 'protracted' and 'big.' " MANUAL, *supra* note 118 at § 0.10.

[120] *Id.* at § 0.40.

[121] *Id.* at § 2.40.

[122] The rules apply to any case that

(a) arises under any of the antitrust laws of the United States;

(b) involves a prayer for recovery of $1,000,000 or more;

(c) involves a request for injunctive relief affecting the operations of a major business entity;

(d) involves a large number of parties of an association of large membership;

(e) is patent case involving an unusual multiplicity or complexity of issues; or

(f) may otherwise be a protracted case.

N.D. OHIO COMPLEX LITIGATION R. 1.

[123] N.D. OHIO COMPLEX LITIGATION R. 4(a).

[124] *Id.*

of "defining the bounds of discovery in accordance with the elaboration and clarification of the issues as a result of the pretrial conferences."[125] The rule specifically provides that a party is not precluded "from changing his position or amending his pleading, where otherwise proper," but the statement of issues nevertheless serves "as a framework for discovery."[126]

The preliminary pretrial conferences, which a number of districts now require soon after the filing of the complaint or answer,[127] also provide a vehicle for preliminary issue definition. Some local rules now require that at the preliminary pretrial, and in statements prepared prior to the actual conference, counsel address what then appear to be the issues in the case.[128] While it is not clear, from information uncovered in the Survey, that judges (or magistrates) actually use this opportunity to define and limit the concept of relevancy for discovery purposes, the potential is clearly present.

The ABA Committee proposes that Federal Rule 26(b)(1) be amended to limit the scope of discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party."[129] The ABA Committee, while recognizing that "[d]etermining when discovery spills beyond 'issues' and into 'subject matter' will not always be easy, recommends the change if only to direct courts not to continue the present practice of erring on the side of expansive discovery."[130]

The Advisory Committee in 1978 rejected the ABA Committee's suggestion of the use of the term "issues" in place of "subject matter of the action" in Federal Rule 26(b)(1):

> The [Advisory] Committee doubts that replacing one very general term with another equally general one will prevent abuse occasioned by the generality of language. Further, it fears that the introduction of a new term in the place of a familiar one will invite unnecessary litigation over the significance of the change.[131]

The Advisory Committee proposed that Federal Rule 26(b)(1) be amended so as to eliminate the "subject matter involved in the pending action"[132] language of the current Rule, and that it be made to read: "any matter, not privileged, which is relevant to the claim or defense" of any party.[133]

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[125] N.D. Ohio Complex Litigation R. 4(b).

[126] *Id.*

[127] *See* note 71 *supra*.

[128] *See, e.g.*, N.D. & S.D. Iowa Civ. R. (18)(A)(1) (as supplemented by standard pretrial orders and clerk's checklist, automatically sent to counsel); D. Mont. R. 11(c)(2); E.D. Pa. R. 7(c). The Northern and Southern Districts of Iowa and the District of Montana place rather elaborate requirements on counsel.

[129] ABA Committee, *supra* note 27, at 2.

[130] *Id.*, at 3 (Committee Comments to proposed amended Rule 26(b)(1)).

[131] 1978 Proposed Draft, *supra* note 26, at 627 (Advisory Committee Note to proposed Rule 26(b)(1)).

After receiving comments on its 1978 proposal, the Advisory Committee receded completely from even this modest change. Its 1979 proposal, presently before the bar, includes no change in Federal Rule 26(b).[134]

Both Committees recommend that the discovery conference, which a party may have as of right upon request, focus on the scope of discovery. The Advisory Committee recommendation is that the request for the discovery conference include a "statement of the issues as they then appear," and that the court order, following the conference, "tentatively identif[y] the issues for discovery purposes," subject to amendment "whenever justice so requires."[135]

It appears that the mechanism to accomplish this end is now present in the local rules of several of the districts. These rules provide for an early conference between court and counsel for the purpose of planning discovery. As noted,[136] several districts specifically require attention to matters involved in defining relevancy for discovery purposes. Moreover, the Northern District of Ohio now provides expressly for issue definition for discovery purposes.[137] The difficulty comes in defining the concept of relevancy so as to avoid erring "on the side of expansive discovery." This task is not made any easier by the Supreme Court's recent dicta on the subject.[138] Even overcoming that difficulty, success will depend upon a federal judge who actively takes charge of a case at its very beginning and assists cooperative counsel in drawing reasonable lines of relevancy for discovery purposes. No rule, local or federal, can ensure this essential element. But a rule may help to set a tone for both bar and bench to follow.

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[132] FED. R. CIV. P. 26(b)(1).

[133] 1978 PROPOSED DRAFT, *supra* note 26, at 623. The Advisory Committee explained: "If the term 'subject matter' does in fact persuade courts to err 'on the side of expansive discovery,' it should be eliminated, and that is the course recommended by the Committee." *Id.* at 627-28.

[134] 1979 REVISED DRAFT, *supra* note 26, at 1.

[135] *Id.* at 3-4 (Advisory Committee proposed Rule 26(f)). The ABA Committee recommendation is somewhat different. That Committee recommended that the request for a discovery conference include "a statement of the issues *to be tried*," and that the court "shall enter an order *fixing the issues*," subject, of course, to amendment "[u]pon a showing of good cause . . . ." ABA COMMITTEE, *supra* note 27, at 4 (emphasis added) (proposed new Rule 26(c)). The difference in approach is that the ABA Committee appears to propose that the initial discovery conference fix the issues *for trial*, subject to amendment for "good cause." The Advisory Committee, on the other hand, proposes only that the issues be set for *discovery purposes* at the initial conference, leaving issue identification for trial to the final pretrial conference, as is the case now.

[136] *See* note 128 *supra* and accompanying text.

[137] *See* text accompanying notes 122-26 *supra*.

[138] Oppenheimer Fund, Inc. v. Sanders, 98 S. Ct. 2380, 2389 (1978), *quoted at* text accompanying note 116 *supra*.

B. USE OF DISCOVERY DEVICES

Several of the discovery devices have come under fire as being easily subject to abuse. Suggestions have also been made that these devices can be rendered more efficient and economical to use. Again, the district judges have been experimenting.

1. *Interrogatories*

The use of interrogatories, authorized by Rule 33, has received a great deal of attention. The *Field Survey of Federal Pretrial Discovery*, conducted by the Project for Effective Justice of Columbia University Law School a decade and a half ago, found that interrogatories were thought of by attorneys as the discovery device most conducive to friction between parties.[139] The Advisory Committee and the ABA Committee have noted the existence of discovery abuse attributable to the use of Rule 33 interrogatories.[140]

Many district courts have responded to this situation with local requirements. One district judge, for example, has let it be known that the "use of interrogatories is not allowed until other means have been exhausted, and then only upon good cause shown to the Court."[141] Another has limited the scope of interrogatories.[142] Several

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[139] Rosenberg, *supra* note 18, at 490; *see* FIELD SURVEY, *supra* note 9.

[140] The Advisory Committee reported that "[t]here is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device." FED. R. CIV. P. 33, Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 455 (1976). In 1977, the ABA Committee stated that "[n]o single rule was perceived by the Bar at large . . . as engendering more discovery abuse than Rule 33 on interrogatories." ABA COMMITTEE, *supra* note 27, at 20 (Comments to proposed Rule 33).

[141] SURVEY, *supra* note 31 (response of Ralph A. Cosenza, Minute Clerk, regarding the practice of Judge Pollack of the Southern District of New York).

These local rules limiting the scope and use of interrogatories seem to be inconsistent with the express language of Rule 26(a). Rule 26(a) instructs that

> [p]arties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, *the frequency of use of these methods is not limited.*

FED. R. CIV. P. 26(a) (emphasis added). *See also* note 117 *supra*.

[142] A standard order of Judge Williams of the Northern District of California states that

> [i]nterrogatories shall be specifically directed to (1) securing the names, location and probable testimony of witnesses, (2) the existence, location and general description of relevant documents and other physical evidence, and (3) information concerning the transaction(s) upon which the claims for

district courts have enacted maximum limits on the number of interrogatories that may be filed without special court permission.[143] For example, the Middle District of Florida restricts the number that may be served by any party upon any other party "at one time or cumulatively" to no "more than fifty interrogatories . . . including all parts and subparts."[144] The Northern District of Illinois limits the number to twenty, but counts as a single interrogatory one with subparts that "relate directly to the subject matter of the interrogatory."[145] A few judges limit a party to twenty interrogatories including all subparts.[146] All of these courts and judges permit additional interrogatories on motion for good cause shown. As Rule 33 provides no limitation in number, the validity of such local rules is questionable.

Several districts also "prohibit the filing of mimeographed or otherwise duplicated forms of 'stock' interrogatories except where the nature of the case or the number of the parties makes the use of such forms necessary and feasible."[147] On the other hand, a few districts allow the use of court-approved uniform interrogatories,[148] to be "used only if it is appropriate in the particular case."[149] The efficiency effected is that "[n]o objection to the form or substance" may be

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relief are based. Broadly generalized, boilerplate interrogatories will not be permitted.

SURVEY, *supra* note 31.

[143] *See, e.g.*, M.D. FLA. GEN. R. 3.03(a); N.D. ILL. GEN. R. 9(2); SURVEY, *supra* note 31 (standard order of Judge Turrentine of the Southern District of California; standard instruction of Judge Owens of the Middle District of Georgia; standard order of Judge McMillan of the Western District of North Carolina; practice of Judge Burns of the District of Oregon, as indicated by the response of Robert M. Christ, Clerk; standing order of Judge Cahn of the Eastern District of Pennsylvania; standard letter instructions of Judge Teitelbaum of the Western District of Pennsylvania).

[144] M.D. FLA. GEN. R. 3.03(a).

[145] N.D. ILL. GEN. R. 9(g). Other districts also follow this practice. *See* SURVEY, *supra* note 31 (standard order of Judge Turrentine of the Southern District of California; practice of Judge Burns of the District of Oregon, according to the response of Robert M. Christ, Clerk; standing order of Judge Cahn of the Eastern District of Pennsylvania).

[146] *See* SURVEY, *supra* note 31 (standard instructions of Judge Owens of the Middle District of Georgia; standard order of Judge McMillan of the Western District of North Carolina; standard letter instructions of Judge Teitelbaum of the Western District of Pennsylvania).

[147] E.D. ILL. R. 10(b); N.D. IND. R. 8(b). Judge Owens of the Middle District of Georgia, who limits parties to twenty interrogatories—counting parts and subparts—has instructed counsel: "Form, canned interrogatories in excess of twenty are not usually approved." *See* SURVEY, *supra* note 31. *See also* E.D. VA. R. 11(D) (prohibiting such interrogatories unless the attorney has deleted all extraneous matter and certifies that he has read the remaining portions and has a good faith belief that the contents are pertinent to the case).

[148] *See, e.g.*, D. ARIZ. CIV. R. 37(b)(1); W.D. MO. R. 20(D)(4); E.D. PA. R. (Interrogatories Approved for Asking in Appropriate Cases)(addendum to local rules under letter of Dec. 7, 1956).

[149] D. ARIZ. CIV. R. 37(b)(2).

made concerning the approved interrogatory[150] unless it is "not within the scope of permissible discovery in the particular action."[151]

Efficiency would dictate that each interrogatory propounded and the answer or objection thereto be typed (or otherwise produced) in close proximity to each other. This is required by a great number of districts. But they differ on where they place the burden of conformity. Many insist that the party propounding the interrogatory leave a space immediately following the interrogatory, and that that space be sufficient in size for the answer or objection.[152] Others require that the party to whom the interrogatories have been propounded quote the interrogatory immediately before each answer or objection.[153] A few place the initial burden on the interrogator but then tell the answerer that, if the space left is insufficient, the answerer must quote the interrogatory immediately prior to each answer or objection.[154]

Another problem concerns a practice of using an objection to a part of an interrogatory as an excuse for not answering the remaining portion. A few courts have addressed this problem by providing that, if an objection is made to a part of an interrogatory, the respondent shall answer that part to which there is no objection.[155] One court requires the respondent in such a situation to certify that he has answered all parts of the interrogatory that he does not consider objectionable.[156]

Although neither Federal Rule 33 nor Federal Rule 37 imposes a time limit on the use of a motion to compel an answer to an interrogatory, several districts have attempted to prevent delays in answering interrogatories by imposing such time limits.The Southern District of California, for example, has provided that a motion to compel an answer to an interrogatory is waived if not filed within fifteen days after service of the answer or objection.[157] The District of Massachusetts, in addition, provides that, if the court grants a motion to compel an answer, the answer shall be filed within fifteen days of the order, unless the court otherwise directs.[158] On the other hand, the Massachusetts District also provides a method for an automatic extension of twenty days for the thirty-day time period to answer interrogatories. The propounder of interrogatories not answered in time must apply to the clerk of the court for a Notice of Delinquency, which the clerk is to send to the respondent. No motion to compel answer or sanction may be filed for twenty days thereafter.[159]

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[150] W.D. Mo. R. 20(D)(4).

[151] D. Ariz. Civ. R. 37(b)(2). Another efficiency mechanism exists in the District of Arizona, where the rules provide that the interrogator need not file approved interrogatories with the court at the time of service, but instead need file only a notice of the identifying numbers of the approved interrogatories that were served. D. Ariz. Civ. R. 37(b)(3); *see* text accompanying note 234 *infra* (discussion of filing requirements).

[152] *See, e.g.*, D. Ariz. Civ. R. 37(a)(2); M.D. Fla. R. 3.03(b); N.D. Ind. R. 8(a); N.D. & S.D. Iowa Civ. R. 17(c); D. Kan. R. 17(d); D.N.H.R. 14(a)(1); D.N.J. Gen. R. 16; N.D. Ohio Civ. R. 3(d); W.D. Pa. R. 4(b); W.D. Wash. Civ. R. CR33(d)(1).

[153] *See, e.g.*, D. Alaska Gen. R. 8(D); E.D. & W.D. Ark. R. 10; E.D. Cal. Gen. R. 6(b); N.D. Cal. Civ. R. 230(1); S.D. Cal. R. 6(c); D. Conn. R. 21; D. Del. R. 19; D.D.C. Civ. R. 1-9(A); E.D. Ill. R. 10(a); N.D. Ill. Gen. R. 9(c); S.D. Ind. R. 12(a); E.D. La. R. 3.12; D. Me. R. 16(a); D. Mass. R. 15(a)(2); N.D. Miss. Civ. R. C-5; D. Mont. R. 8(e); D.N.D.R. IV(F)(4); N.D. Okla. R. 10(c); W.D. Okla. R. 9(c); E.D. Pa. R. 25(a); D.R.I.R. 13(a); W.D. Tenn. R. 9(f).

[154] *See, e.g.*, D. Ariz. Civ. R. 37(a)(4).

[155] S.D. Cal. R. 6(c); D. Mass. R. 15(c); E.D. Mich. R. XIV; W.D. Pa. R. 4(c); D.R.I.R. 13(c).

[156] E.D. Mich. R. XIV.

Three districts have local rules concerning the duty to supplement answers given to interrogatories. The District of Delaware provides that "[a]ll interrogatories and answers thereto shall be deemed to be continuing, unless otherwise ordered by the Court."[160] In the District of Massachusetts, if a response to an interrogatory is complete when made, there is no duty to supplement it without a court order.[161] The District of New Hampshire provides that there is a duty to supplement only an interrogatory that seeks information concerning the identification of persons with knowledge of relevant facts.[162] All three local rules appear to be more restrictive than the federal rule,[163] and therefore appear to be of doubtful validity.[164]

Both the ABA Committee and the Advisory Committee have proposed amendments to Federal Rule 33 involving interrogatories. The ABA Committee suggests that Rule 33(a) be amended to limit to thirty the number of interrogatories that one party may serve on another party without a court order "to be granted upon a showing of necessity . . . ."[165] The Committee has commented that, while it had considered numerous solutions to the problems with interrogatories, it had "determined that an initial numerical limitation on interrogatories filed as a matter of right was the soundest approach to limiting interrogatory abuse and to enhancing better use of interrogatories as a discovery mechanism."[166] The ABA Committee proposal includes a provision that "[e]ach interrogatory shall consist of a single question."[167] The Committee would make an exception, however: "[I]nterrogatories inquiring as to the names and locations of witnesses or the existence, location and custodians of documents or physical evidence [should] each be construed as one interrogatory. Greater leniency is recommended in these areas because they are well suited to non-abusive exploration by interrogatory."[168]

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[157] S.D. Cal. R. 3(c)(9).

[158] D. Mass. R. 15(c).

[159] D. Mass. R. 15(g).

[160] D. Del. R. 19.

[161] D. Mass. R. 13.

[162] D.N.H.R. 14(e).

[163] *See* Fed. R. Civ. P. 26(e).

[164] *See* notes 29, 117 *supra* and accompanying text.

[165] ABA Committee, *supra* note 27, at 18.

[166] *Id.* at 20 (Comments to proposed Rule 33).

[167] *Id.* at 18 (proposed Rule 33(a)).

The Advisory Committee has rejected the ABA suggestions. At first, it would have amended Rule 33(a) to permit each district court, by the action of a majority of its judges, to limit the number of interrogatories that may be used by a party. The Advisory Committee noted that some districts now impose limitations on the number of interrogatories that may be served without court permission.[169] It stated that other districts might be deterred from imposing such limits by Federal Rule 26(a), which makes the validity of such local rules doubtful at the present time.[170] By specifically authorizing a local rule in this regard, the Advisory Committee proposal, if adopted, would have removed possible objections to the local rules.

The Advisory Committee, however, has now dropped this proposal. In its 1979 Revised Preliminary Draft, there is no authorization for district courts to limit the number of interrogatories,[171] thus retaining the present system.

The proposed revisions of Federal Rule 33 have also addressed a problem that has apparently received no attention in any local district court rule or procedure. Under Federal Rule 33, a party responding to an interrogatory in lieu of answering, may make available to the proponent business materials from which the answer may be derived. Although the Advisory Committee has stated that "[a] respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records,"[172] some parties have used the business records option to force upon the interrogating party a great mass of unorganized documents, sometimes "all of their records."[173] To alleviate this problem, both the Advisory Committee and the ABA Committee propose adding to Federal Rule 33(c) a requirement that the responding party, when turning over the records from which the interrogating party is to ascertain the answer, not only is to "specify the records from which the answer may be derived," but also include "sufficient detail as to permit the interrogating party to locate and to identify as readily as can the party served the records from which the answer may be ascertained."[174] The ABA Committee notes that, as a part of the answers to interrogatories, the specification is to be under oath.[175]

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[168] *Id.* at 20 (Comments to proposed Rule 33).

[169] 1978 PROPOSED DRAFT, *supra* note 26, at 649 (Advisory Committee Note to proposed amended Rule 33); *see* note 143 *supra*.

[170] FED. R. CIV. R. 26(a) states, "Unless the court orders otherwise under subdivision (c) of this rule [dealing with protective orders], the frequency of use of these [discovery] methods is not limited."

[171] *See* 1979 REVISED DRAFT, *supra* note 26, at 13-14.

[172] FED. R. CIV. P. 33(c), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 457 (1976).

[173] 1979 REVISED DRAFT, *supra* note 26, at 14 (Comment to proposed Rule

While this change will do no harm and may do some good, two comments are warranted. If the matter addressed has been a problem of general application, it seems strange that no district court has adopted a local rule on the point and that the Survey discovered no district judge who had included the point in a standard order, instruction, or practice. Second, it is difficult to understand why trial judges, upon proper motion to compel answer in accordance with the current requirement of Federal Rule 33(c)—that the respondent furnishing business records "specify the records from which the answer may be derived,"—do not order "specification [in] . . . sufficient detail" for the interrogator to match the relevant documents to the relevant interrogatory. Perhaps a specific direction will lead counsel to expect, and judges to demand, what should be obvious.

2. *Depositions*

The local rules and practices concerning depositions, authorized by Rule 30, have been less sweeping than local rules concerning interrogatories. One district judge, in an attempt to hold down the cost of discovery, suggests to counsel that he limit deposition "to information needed under oath."[176] He then offers the following advice: "Interview even hostile witnesses before you depose them and then eliminate possibly unnecessary questions such as life history and names of all relatives since your client is paying you and a court

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33(c)); *see* ABA Committee, *supra* note 27, at 20 (Comment to proposed Rule 33).

[174] 1979 Revised Draft, *supra* note 26, at 13-14 (proposed Rule 33(c)); *see* ABA Committee, *supra* note 27, at 19-20 (same) (substantially identical language).

[175] *See* ABA Committee, *supra* note 27, at 21 (Comment to proposed Rule 33).

[176] *See* Survey, *supra* note 31 (standard instruction of Judge Owens of the Middle District of Georgia).

Another practice that could influence counsel to refrain from asking questions of doubtful relevance is the requirement of many judges that counsel offering a deposition at trial excise all irrelevant portions. *See, e.g.*, E.D. Va. R. 21(E), (F); Survey, *supra* note 31 (standing orders of Judges Schnacke and Williams of the Northern District of California; standard pretrial order of Judges Guy, Kaess, and Joiner of the Eastern District of Michigan; standing order of Judge Alsop of the District of Minnesota; standing order of Judge Walinski of the Northern District of Ohio; standing order of Eastern Division of the Southern District of Ohio).

reporter. Holding costs down will benefit you and your client." The judge further advises that, "if [counsel] think unnecessary depositions are being taken," counsel should "suggest that to the court and consideration will be given to limiting their taking."[177]

Several districts have, in addition, defined the requirement imposed by Federal Rule 30(b) that "reasonable notice" be given of the taking of a deposition. Some require a minimum of five days,[178] others ten days,[179] unless the court orders a shorter time. One district requires a longer time if the deposition is to be taken more than fifty miles away.[180]

Two courts, concerned about the inconvenience caused to a nonresident party forced to travel a great distance for the purpose of a deposition, have promulgated a "general policy" that "a non-resident plaintiff may reasonably be deposed at least once in this District during the discovery stages of the case."[181] In the Middle District of Florida, a "non-resident defendant who intends to be present in person at trial may reasonably be deposed at least once in this District during the discovery stages of the case or within a week prior to trial as the circumstances seem to suggest."[182] Any other nonresident party may be deposed as a witness pursuant to Rule 45(d) of the Federal Rules.[183] Thus, in the Northern District of Florida, *any* nonresident defendant, and in Middle Florida, any nonresident defendant who does not intend to appear in person at trial and any nonresident plaintiff beyond the first deposition, may be deposed in the district where suit is brought *only* if subpoenaed and if the subpoena is served in the district or within forty miles of the district.[184] Although intent to avoid inconvenience may be admirable, these local rules appear to be directly contrary to Federal Rules 30(a) and (b)[185] and 37(d)[186] and are of questionable validity.[187]

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[177] *See* Survey *supra* note 31 (standard instruction of Judge Owens of the Middle District of Georgia).

[178] *See, e.g.*, D. Kan. R. 17(b). E.D. Va. R. 21(G) provides that seven days "shall constitute reasonable notice," but this is to vary "according to the complexity of the contemplated testimony and the urgency of taking the deposition of a party or witness at a particular time and place."

[179] *See, e.g.*, M.D. Fla. Gen. R. 3.02; Survey, *supra* note 31 (standing order of Chief Judge Nealon of the Middle District of Pennsylvania, para. 4.2).

[180] D.D.C. Civ. R. 1-16(b).

[181] N.D. Fla. Gen. R. 8(B); M.D. Fla. Gen. R. 3.04(d). The Northern District defines a "non-resident" as a person who lives outside the Northern District of Florida. The Middle District defines "non-resident" as one who lives outside the State of Florida.

[182] M.D. Fla. Gen. R. 3.04(d).

[183] The corresponding local rules are N.D. Fla. Gen. R. 8(B); M.D. Fla. Gen. R. 3.04(d).

[184] *See* Fed. R. Civ. P. 45(d).

Two other solicitous courts provide for payment of expenses when a deposition is to be taken at a distant place. One provides that, if a deposition is to be taken more than 150 miles from the federal courthouse, the court "may provide" in a protective order that the party noticing the deposition pay the expenses of attending, including the reasonable fees of one attorney for the adverse party.[188] The other provides that, if a deposition that will be used at trial is taken outside the division of the court in which the action is pending, the party noticing the deposition "shall . . . prepay or secure the cost of travel" of one opposing counsel to the place of deposition and return.[189] Although a court may have the power to issue such an order in an individual case, acting under its authority to issue a protective order,[190] it appears to be beyond the court's power to exact such a price as an ordinary matter in every case. The protective order rule contemplates that the court weigh the respective hardships in each individual case and place at least the initial burden on the person seeking the protective order. These local rules make the protective order the norm, with the burden of its non-application on the party seeking discovery. For that reason, these rules are of doubtful validity.

The most frequently adopted rule regarding depositions concerns whether a deposition filed in court is open for all to see and, if not, who may open it. Federal Rule 30(f) now provides that when a deposition is transcribed,[191] the officer before whom the deposition was taken is to certify it, "then securely seal the deposition in an envelope" and file it or mail it to the clerk for filing in the court where the action is pending. The Federal Rule makes no mention of unsealing. A few district courts provide that, when the sealed deposition is filed, it shall be opened by the clerk.[192] Most provide that it shall remain sealed. A few then state that to open the seal requires an order of court or a stipulation of the parties.[193] The vast majority provide that the seal shall be opened upon request of any counsel in the case.[194]

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[185] The relevant portions of Rule 30 state:

> After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. . . . The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

FED. R. CIV. P. 30(a).

> A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the material to be produced as set forth in the subpoena shall be attached to or included in the notice.

FED. R. CIV. P. 30(b)(1).

[186] Federal Rule 37(d) provides that if a party fails to appear before the officer who is to take his deposition, after being served with a proper notice, the court in which the action is pending on motion may take facts to be established as presented by the adverse party, refuse the delinquent party the privilege of supporting certain claims or defenses, strike out all or any part of any pleading of that party, dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party. FED. R. CIV. P. 37(d).

[187] *See* notes 29 & 117 *supra*.

[188] N.D. ILL. CIV. R. 4(a). For a similar provision for depositions more than 100 miles from the courthouse, see S.D.N.Y. CIV. R. 5(a).

[189] E.D. VA. R. 21(B)-(C). Certain limits are placed on those expenses and fees.

[190] FED. R. CIV. P. 26(c).

The Advisory Committee and the ABA Committee made no recommendations on the matters covered by these local rules. They have, however, proposed certain amendments to the deposition rules that should make depositions somewhat less expensive. Their proposals would authorize the taking of a deposition by other than stenographic means, but the Advisory Committee will require either a stipulation or a court order upon motion.[195] Taking a deposition by telephone would be authorized.[196] But the deposition, if transcribed, would still need to be filed at that time.[197]

3. *Requests for Production*

A few local rules and individual judge practices address problems with requests for production under Federal Rule 34. A few discourage formal requests, urging counsel to use informal letters[198] or to meet informally soon after the commencement of the action and exchange documents for purposes of inspection and copying.[199] One court suggests that a response to a request for production shall reproduce each request immediately before the response thereto.[200] Two others require that, when a response to a request for production contains an objection, it must also contain a certification that the objector has complied with the request to the extent that it is not considered objectionable.[201] One court, in an apparent attempt to speed discovery, requires that within fifteen days of receipt of a request for production, a party who intends to object to all or part of that request must file, presumably in court, a notice of intention to object to all or part of the request.[202] A failure to file the notice "will constitute a waiver of the privilege of objecting."[203] This Rule cuts the time limit provided by Federal Rule 34 by as much as one-half.[204] Moreover, by requiring filing in court by the objector, it returns to the structure abandoned by the 1970 amendments.[205] For these reasons, this local rule appears to be invalid.

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[191] Fed. R. Civ. P. 30(c) provides that a deposition shall be transcribed "if requested by one of the parties . . . ."

[192] *See, e.g.*, N.D. & S.D. Iowa Civ. R. 17(A); E.D. La. R. 7; D. Me. R. 15(b); D. Mont. R. 8(c); N.D. Ohio Civ. R. 6(b); D.R.I.R. 14(b).

[193] *See, e.g.*, D. Idaho R. 17; D. Nev. Civ. R. 17(A)5. *Cf.* D. Alaska Gen. R. 8(A)(opened by order of court or "upon request of counsel for either party").

[194] *See, e.g.*, N.D. Ga. R. 210; E.D. Ill. R. 16; D. Mass. R. 14.

[195] 1979 Revised Draft, *supra* note 26, at 7 (proposed amendment to Federal Rule 30(b)(4)). The ABA Committee proposes that non-stenographic taking of a deposition be permitted solely upon notice to that effect in the notice of the deposition. *See* ABA Committee, *supra* note 27, at 10-14. While the Advisory Committee at first agreed, *see* 1978 Proposed Draft, *supra* note 26, at 640, it has pulled back, stating that it "is not satisfied that a case has been made for a reversal of present practice." 1979 Revised Draft, *supra* note 26, at 10 (Advisory Committee Note to proposed new Federal Rule 30(b)(4)); *see id.* at 7. Yet, the Committee would explicitly authorize electronic recording of depositions by stipulation or order to encourage its use so that "greater experience" might be gained. *Id.*

[196] *Id.* (Rule 30(b)(1)).

[197] The ABA Committee urged that the present filing requirement for depositions be changed so that they would need to be filed only when used in a court proceeding, unless the court otherwise directs. *See* ABA Committee, *supra* note 27, at 1, 15, 17 (proposed amendments to Federal Rules 5(d), 30(f), 31(b)). The Advisory Committee originally concurred as far as oral depositions were concerned. *See* 1978 Proposed Draft, *supra* note 26, at 642 (proposed amendment to Rule 31(b)). Without

Again, the Advisory Committee and the ABA Committee have addressed none of these concerns. But they do urge one amendment to Federal Rule 34. Addressing what it called the "reprehensible practice [of] . . . the deliberate attempt by a producing party to burden discovery with volume or disarray," the ABA Committee noted that "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance."[206] Thus, both the ABA Committee and the Advisory Committee recommend the addition of the following to Federal Rule 34 (in the words of the Advisory Committee proposal): "A party who produces documents for inspection shall produce them as they are kept in the usual

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comment, the 1979 version dropped all mention of filing depositions, thus retaining the present requirement. *See* 1979 REVISED DRAFT, *supra* note 26, at 8.

[198] *See, e.g.*, SURVEY, *supra* note 31 (practice of Judge Pollack of the Southern District of New York, as indicated by the response of Ralph A. Cosenza, Minute Clerk). The gain in efficiency yielded by use of this local rule is not apparent.

[199] *See, e.g., id.* (Notice to Counsel of Judge Nelson of the Central District of California.).

[200] N.D. CAL. CIV. R. 230(2).

[201] S.D. CAL. R. 6(c); E.D. MICH. R. XIV.

[202] W.D. MO. R. 28.

[203] *Id.*

[204] FED. R. CIV. P. 34(b) provides 30 days in which to object and in certain circumstances 45 days.

[205] A purpose of the 1970 amendment to rule 34 was "to have the rule operate extrajudicially," since the "extrajudicial procedure . . . has the potential of saving court time . . . ." FED. R. CIV. P. 34(a), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 458 (1976).

[206] ABA COMMITTEE, *supra* note 27, at 22 (Comment to proposed amended Rule 34).

course of business or shall organize and label them to correspond with the categories in the request."[207]

A more significant proposal is being considered by the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation.[208] The Commission, concerned about the cost of producing large masses of documents,[209] has proposed that the district courts each adopt a local rule which would allow the discovering party to proceed under one of two options.[210] Option 1 would require the discoveree, in response to a request, to divulge the location of relevant files, identify individuals knowledgeable as to the organization and maintenance of those files, and supply a description of the categories of documents at each location. Provision is made for a master or magistrate to interview or depose file personnel or even to conduct an inspection of the files himself. The discovering party would be required to give notice of the sequence of proposed inspection of the documents to permit the discoveree an initial review for privileged or other confidential materials. Option 2 is simply to proceed as is now provided by Federal Rule 34, except that the court, in ruling on objections, must take into account that the discoveror has elected *not* to assume the burden and expense of the file search, preferring to delegate that onus to the discoveree.

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[207] 1979 REVISED DRAFT, *supra* note 26, at 16.

[208] *See* Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, Proposed Local Rule 34 (Apr. 10, 1978) (unpublished draft and commentary) [hereinafter cited as Second Circuit Draft].

[209] The Second Circuit Commission states,

> 1. In any substantial case, if the lawyers do their jobs, virtually all documents relating to the subject matters of the case will be produced. But to get to that stage often requires an extraordinarily and unnecessarily expensive process of voluminous, detailed requests, almost equally voluminous and detailed objections, extensive motion practice, hearings before the magistrate or the court or both, and quite possibly a series of depositions.
>
> 2. After those expenses have been incurred and orders to produce have been issued, the party seeking production assumes the not inconsiderable risk that documents he really wants—the damaging documents—will not be produced. The burden of the initial file search of course falls on the opposing party, but he has the opportunity to review files against specifically worded requests and thus to "construe" those requests in a manner which will avoid the production of damaging materials.
>
> 3. Aware of this risk, the party seeking production will tend to draft his request broadly, which results in his calling for large volumes of materials he does not really want. In most instances he will receive precisely such materials—possibly tons of worthless paper—which the party making production has considerable incentive to give him. That is so, because the larger the volume of paper produced, no matter how innocuous, the stronger will be the grounds, as a practical matter, for opposing any further document requests.
>
> 4. In a large document case, the amount of work done by the party receiving production—in reviewing and understanding the materials produced—may not be significantly less than the amount of work done by the party making production. In effect, the system occasions a large duplication of expense which . . . may well be unnecessary.

Second Circuit Draft, *supra* note 208, at 5-7.

[210] *Id.* at 1-3.

Under Option 1, the inordinate expense attending the legal profession's version of German chess[211] appears to be effectively eliminated in the area of drafting and litigating detailed document requests and objections. The Commission's answer to the argument that Option 1 enables the discoveror to view greater numbers of irrelevant documents and is therefore a greater invasion of privacy is a pragmatic one: the present system already "generates production of huge quantities of irrelevant materials."[212] The theory is that under Option 1, the discoveror, being better informed, is likely to be more selective, the more so since he performs his own file search rather than relying on documents selected by his adversary. The Commission counters the argument that Option 2 is virtually forced upon plaintiffs who lack the resources to cope with massive corporate files[213] with the obvious fact that Option 2 is in any event no more burdensome than the limited procedures now available under Rule 34.[214]

The Commission's proposal is a thoughtful and realistic attempt to deal with a discovery procedure that, even if not abused, subjects the parties to inordinate expenditures of time and money. But it is designed for the big or complex case and should be so limited. In relatively simple litigation, a party should not have carte blanche under Option 1 to roam about his opponent's files. This procedure should be made a part of local rules that are applicable only to big or complex cases, a precedent that the Northern District of Ohio has already set.[215] Whether or not that is done, the rule can and should operate only under the close supervision of a magistrate or master, as the Commission's draft would propose, or through early discovery conferences as visualized in the proposed revisions to Federal Rule 26[216] and in the *Manual for Complex Litigation*.[217]

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[211] German chess—Kriegspiel—is a variant of chess in which a player sees only his own pieces and must deduce the position of the opponent's forces as the referee removes captured pieces from the board.

[212] Second Circuit Draft, *supra* note 208, at 10.

[213] The Commission notes, "This argument might have had some appeal in 1946; it does not now." *Id.* at 9.

[214] Indeed, those presently able to utilize the current system of document production successfully can only be aided by the proposed local rule. The local rule gives the plaintiff with limited resources who elects Option 1 the ability to control the amount of documentation he reviews, and provides him a better idea of what his opponent possesses than he would be able to form under the present system.

[215] *See* text accompanying notes 122-26 *supra*.

[216] *See* text accompanying notes 101-06 *supra*.

[217] *See* text accompanying note 118 *supra*.

4. *Requests for Admissions*

The Federal Rule 36 requests for admissions procedure seems to be working well. Neither the Advisory Committee nor the ABA Committee proposed any change in Federal Rule 36 and the local rules address only two points. One is a requirement that the person responding to a request quote the request immediately before the response.[218] Some districts require that the propounder of the request leave sufficient room for a response.[219] Secondly, two districts require that when a response to a request for admission contains an objection, the response must also contain a certification that the objector answered the request to the extent not considered objectionable.[220]

5. *Physical or Mental Examinations*

Unlike other federal discovery rules,[221] Federal Rule 35, which provides for orders for physical and mental examinations, requires a motion and a showing of good cause. Although the Advisory Committee Note to the current version of Rule 35 contains some implication that parties should agree on the examination without the need to invoke judicial intervention,[222] only one local rule encourages this, and then only indirectly. The Northern District of Mississippi provides that every motion for such an examination not accompanied by a consent order must be accompanied by an affidavit of movant's counsel stating that efforts to reach an agreement were unsuccessful.[223] This device is a small step in the direction of saving court time.

Neither the Advisory Committee nor the ABA Committee addressed this rule.

6. *Filing Requirements*

As originally promulgated in 1938, the Federal Rules did not require the filing in court of all discovery papers. Depositions, when transcribed,[224] were to be filed,[225] as were notices of depositions and motions concerning discovery.[226] There was no requirement, however, to file interrogatories, answers to interrogatories, requests for admission or responses to such requests. The general filing requirement of Federal Rule 5(d) extended only to "papers . . . required to be served upon a party . . . ."[227] As Federal Rule 5(a) did not require that discovery papers be served, it was at least arguable that the filing requirement of Federal Rule 5(d) did not apply.[228] In 1970, however, Federal Rule 5(a) was amended to extend service requirements to "every paper relating to discovery required to be served upon a party unless the court otherwise orders . . . ."[229] Thus, the filing requirement of Federal Rule 5(d) was brought into play.

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[218] *See, e.g.*, D. Alaska Gen. R. 8(E); E.D. & W.D. Ark. R. 10; C.D. Cal. R. 6(c); N.D. Cal. Civ. R. 230(3); S.D. Cal. R. 6(c); D.D.C. Civ. R. 1-9(A); D. Me. R. 16(a); D.N.D.R. IV(F)(4); N.D. Okla. R. 10(c); W.D. Okla. R. 9(c).

[219] *See, e.g.*, D. Ariz. Civ. R. 37(a)(2); D.N.H.R. 14(a)(1); D.N.J. Gen. R. 16; N.D. Ohio Civ. R. 3(d).

[220] S.D. Cal. R. 6(d); E.D. Mich. R. XIV.

[221] The only other rule exacting such a requirement is that relating to the taking of depositions before the commencement of an action or pending an appeal. Fed. R. Civ. P. 27.

[222] The Advisory Committee Note says, "Examinations are very frequently made by agreement and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied [however], . . . and [the new provision specifically allowing examination by agreement] appears best to fill the technical gap in the [pre-amendment] rule." Fed. R. Civ. P. 35(b)(3), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 459 (1976).

[223] N.D. Miss. Civ. R. C-2. Of course, other local rules requiring attempts to reach agreement before discovery motions are filed would accomplish the same result if applied to Rule 35 motions. *See* notes 52-54 *supra* and accompanying text.

The filing requirement has proven to be quite onerous to district court clerks' offices and an item of significant expense for counsel. These filed papers have little application in resolving matters at trial, since only a small fraction of civil cases that go through discovery are actually tried. Moreover, discovery disputes seldom arise, as evidenced by the fact that certain important papers—motions to compel and for protective orders, for example—are not filed in every case, and when filed often address only specific matters within a particular discovery request. Thus, most filings of discovery documents serve, at best, only the limited purpose of furnishing a relatively official copy of the documents should a question arise as to authenticity.

Some district courts insist that counsel carry out the literal requirement of Federal Rule 5 that all papers relating to discovery be filed.[230] Two districts even prohibit the parties from stipulating that a transcribed deposition not be filed.[231] The Northern District of Illinois provides a sanction for failure to file: the use of an unfiled deposition "for any purpose" is barred.[232]

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[224] Fed. R. Civ. P. 30(c)(1938) provided that a deposition "shall be taken stenographically and transcribed unless the parties agree otherwise." The 1970 amendments changed this to require transcription only if one of the parties so requested.

[225] Fed. R. Civ. P. 30(f) (1938).

[226] Fed. R. Civ. P. 5(a), (d)(1938).

[227] Fed. R. Civ. P. 5(d)(1938).

[228] The contrary was also arguable, as Federal Rules 33 and 36 *did* require service of interrogatories and requests for admissions and responses thereto. Fed. R. Civ. P. 33, 36 (1938).

[229] The purpose apparently was to ensure that in a multiple-party case discovery papers between two of the parties were served on all parties. No attention seemed to be given to the impact this would have on filing. *See* Fed. R. Civ. P. 5(a), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 401 (1976).

[230] *See, e.g.*, D.N.H.R. 14; D.N.J.R. 15(C); S.D.N.Y. Gen. R. 6(c). D. Alaska Gen. R. 8(C), not only insists that interrogatories and answers be filed, but states further that "[a]ll documents, photographs, maps or diagrams attached to such interrogatories or answers shall likewise be filed with the Clerk." D. Alaska Gen. R. 8(B) also provides that depositions shall be lodged and not filed with the Clerk and "shall be kept separately [from the file folder] and noted in the docket of the case." This rule is apparently to help preserve the secrecy of the deposition, *see* D. Alaska Gen. R. 8(A), and not for any reason of efficiency.

Other districts, by contrast, have attempted to ameliorate the requirements of Federal Rule 5(d). Two districts provide that interrogatories and answers thereto shall not be filed except where they become the subject of court consideration through a motion to compel answer, or presumably, a motion to protect.[233] And two other districts provide that interrogatories shall not be filed when served but that the respondent shall file the interrogatories along with the responses.[234]

The District of Puerto Rico supplies an interesting example of the problems encountered by a district court desiring to stay within the letter of the Federal Rules even when a different approach is called for. Its local rule 10 provides that "unless expressly required by the Federal Rules of Civil Procedure, papers relating to any discovery proceedings need not be filed with the Court."[235] Since Federal Rule 5(d) provides that all papers relating to discovery shall be filed, the "unless" clause would seem to nullify the rest of the sentence. Moreover, another portion of Puerto Rico's local rule 10 makes it clear that the filing exemption of the first sentence is meant to apply only to depositions: "However, every time a discovery document is served upon an opposing counsel, proof of service must be filed with the U.S. District Court. The pertinent parts of interrogatories, notices to produce documents or requests for admission, for which rulings are sought, must be included in the motion papers."[236]

Both the ABA Committee and, originally, the Advisory Committee recognized that the costs of providing additional copies of discovery materials for court filing can be considerable and the storage problems faced by clerks' offices in some districts are serious. Therefore, both committees recommended an amendment to Federal Rule 5(d) to provide that, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings.[237] The Advisory Committee however, in its 1979 Revised Draft, dropped all reference to filing requirements, thus leaving the current requirement intact. The Committee offered no explanation for its change of view.[238] As in earlier instances, though, some district courts have already acted.[239] In view of the express language of Rule 5(d), and particularly in view of the Advisory Committee's action, one can easily conclude that these local rules exceed the power of the district courts.

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[231] D. Me. R. 15(b); D.R.I.R. 14(b).

[232] N.D. Ill. Gen. R. 18(c). D.N.D.R. X(A) (if a party fails to file any paper required by Federal Rule 5(d) within five days of service, the court may order the paper to be filed forthwith, and, if the order is not obeyed, the court may order the paper stricken and the service to be without effect).

[233] S.D. Ohio R. 3.7.1; D.N.M.R. 10(d).

[234] M.D. Fla. Gen. R. 3.03(c); W.D. Pa. R. 4(b). As both districts provide that the propounder of interrogatories shall leave room after each interrogatory reasonably calculated to be sufficient for the answer or objection, *see* M.D.. Fla. Gen. R. 3.03(b); W.D. Pa. R. 4(b), this saves double filing of the interrogatories.

[235] D.P.R.R. 10.

[236] *Id.*

V. ENFORCEMENT AND SANCTIONS

Federal Rule 37 provides a full range of sanctions against a party or a nonparty deponent who fails to furnish discovery as required by the rules. But no such sanctions are available for use against a party who overuses or misuses the discovery process.[240] It is of interest that this omission was not corrected when the rules were rewritten a decade ago. Indeed, the Advisory Committee found[241] only "defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed."[242] Thus, the 1970 amendments to Rule 37 were really perfecting amendments to remove these difficulties. Of particular interest was language limiting the cost sanction contained within the Rule to discourage the bringing of discovery disputes to court.[243] While the Advisory Committee spoke of this cost device as "intended to encourage judges to be more alert to abuses occurring in the discovery process," the abuses it referred to were those "implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists."[244]

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[237] *See* 1978 PROPOSED DRAFT, *supra* note 26, at 622; ABA COMMITTEE, *supra* note 27, at 1

[238] Objection to the proposed amendment to Federal Rule 5(d) on the ground that it will reduce the public's access to materials in civil cases has been made in unpublished statements of Division Four of the District of Columbia Bar, and of the Public Citizen Litigation Group on the proposed amendments to the Federal Rules of Practice and Procedure, U.S. Judicial Conference. This objection rests upon an asserted common-law right "to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (footnote omitted). This, of course, begs the issue as to when discovery documents become public. It seems strange that such a common-law right, which the Supreme Court noted has existed since at least 1894, *see id.* at 597 nn.7 & 8, would arguably attach beyond removal to discovery documents which, prior to July 1970, were not to be filed until used in court, *see* text accompanying notes 224-29 *supra*, and hence were not public until that time.

[239] *See, e.g.*, N.D. GA. R. 181; S.D. GA. R. 7; M.D.N.C. CIV. R. 21(m).

[240] The Advisory Committee noted in 1978 that "[r]ule 37 now authorizes sanctions only against those who refuse to make discovery without justification. It does not directly reach those who make unreasonable demands for discovery." 1978 PROPOSED DRAFT, *supra* note 26, at 653 (Advisory Committee Note to proposed Rule 37(e)). This language has been dropped from the 1979 Revised Draft now before the bar. *See also* ABA COMMITTEE, *supra* note 27, at 24-25 (Comment to its proposed Rule 37(e)).

[241] FED. R. CIV. P. 37, Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 463 (1976).

[242] *Id.*

One district, the Western District of Tennessee, has supplemented Rule 37 by providing that filing of unnecessary deposition or discovery motions, applications, requests, or objections will subject the offender to appropriate sanctions, including imposition of costs and counsel fees.[245]

Two district courts go further. The District of Alaska, by local rule, warns that any attorney

> who presents to the Court unnecessary motions or unwarranted opposition to motions . . . or who otherwise so multiplies the proceedings in any case as to increase the costs thereof unreasonably and vexatiously, may be required by the Court to satisfy personally such excess costs and may be subject to such other discipline as the Court may deem appropriate.[246]

The District of Arizona provides that failure to comply "in good faith with the rules governing pretrial discovery" will subject a party to a sanction which the court deems appropriate, including dismissal, default, and costs, and the court may "impose upon either counsel further sanctions, including sanctions for contempt of court."[247]

A few districts have general language in their rules that can form the basis for sanctions applicable to the discovery process. For example, the Central District of California provides that "violation of or failure to conform to any of these local rules"—which include certain matters having to do with discovery[248]—"shall subject the offending party and his attorney, at the discretion of the court, to appropriate discipline," including costs and attorney's fees.[249] The Eastern California district phrases it this way: "Failure of counsel or of a party to comply with these rules shall be ground for any imposition by the Court of any and all sanctions authorized by statute or rule," including fines, costs, and attorney's fees, "as may be within the power of the court."[250]

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[243] Fed. R. Civ. P. 37(a)(4).

[244] Fed. R. Civ. P. 37(a)(4), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app., at 464 (1976). The Advisory Committee referred to the facts that until that time only a handful of reported cases included an award of expenses; and the Columbia Survey, *see* Field Survey, *supra* note 9, found that in only two percent of the motions decided under Rule 37(a) did the court award expenses. Whether the 1970 amended version of Rule 37(a)(3) works any better is not known. *See* notes 262-70 *infra* and accompanying text.

[245] W.D. Tenn. R. 9(c).

[246] D. Alaska Gen. R. 35(D).

[247] D. Ariz. Civ. R. 42(E).

[248] *See* C.D. Cal. R. 6.

[249] *See* C.D. Cal. R. 28.

All other local rules dealing with sanctions do so in the context of failure to prosecute. Many do no more than repeat the general language of Federal Rule 41(b) that failure to prosecute can lead to dismissal.[251] Others provide a certain time guide: the case will be dismissed if it is pending "without any substantial proceedings of record having been taken"[252] or if "no activity by filing of pleadings, orders of the Court or otherwise"[253] has occurred during the time specified. The time provided varies: three months,[254] six months,[255] one year,[256] and fifteen months.[257] Both Iowa districts provide that whenever any deadline set by the Federal Rules, by the local rules, or by order of any federal court is exceeded by more than thirty days and extension has neither been requested nor granted, the action "shall be dismissed by the clerk."[258] Each of these Iowa rules provides for notice to counsel in advance of dismissal, though Northern Georgia allows dismissal "with or without notice."[259]

The Alaska, Arizona, and Eastern Michigan rules providing for sanctions directly against counsel who "multiplies the proceedings . . . [so] as to increase the costs unreasonably and vexatiously" or who fails to comply in good faith with the rules governing pretrial discovery,[260] have a statutory foundation. 28 U.S.C. § 1927 provides: "Any attorney . . . who so multiples the proceedings in any case as to increase the costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."[261]

The Advisory Committee and the ABA Committee have proposed an expansion of Federal Rule 37 sanctions so as to apply to failure to "cooperate in" discovery as well as to "failure to make" discovery. In 1978, they each proposed that a new Federal Rule 37(e) be promulgated, authorizing the court, in addition to other sanctions already authorized in Rule 37, to "impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorney's fees," for the following: "(1) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(f), or (2) otherwise abuses the discovery process in seeking, making or resisting discovery."[262] Moreover, proposed Federal Rule 37(e) was to make explicit reference to 28 U.S.C. § 1927.[263]

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[250] E.D. Cal. Gen. R. 5. *See also* E.D. Mich. R. XXVII(b) ("If counsel fails to comply with any of these rules," the court may assess costs directly against counsel "whose action has obstructed the effective administration of the Court's business, and subject him to such other discipline as the Court may deem appropriate.").

[251] *See, e.g.*, D. Colo. R. 19; D.D.C. Civ. R. 1-14; M.D. Fla. Gen. R. 3.10; D. Kan. R. 26.

[252] N.D. Ga. R. 131.13.

[253] N.D. Fla. Gen. R. 13.

[254] *See, e.g.*, N.D. Fla. Gen. R. 13; M.D. La. Gen. R. 17(B). S.D. Fla. Gen. R. 13 specifies three months before issue.

[255] *See, e.g.*, N.D. Cal. Civ. R. 235(11); S.D. Cal. R. 10; N.D. Ga. R. 131.13; N.D. Ill. Gen. R. 21(a); E.D. La. R. 12.

[256] *See, e.g.*, D. Ariz. Civ. R. 38(d); N.D. Ind. R. 10; D. Md. Supp. R. 33.

[257] *See, e.g.*, E.D. Mo. R. VIII(f).

[258] N.D. & S.D. Iowa Civ. R. 24(B).

[259] N.D. Ga. R. 131.1.

[260] D. Alaska Gen. R. 35D; *see* D. Ariz. Civ. R. 38(d); E.D. Mich. R. XXVII(b).

[261] 28 U.S.C. § 1927 (1976).

The Advisory Committee, however, without explanation or comment, pulled back in its 1979 Revised Draft. While currently proposed new Rule 37(e) explicitly authorizes a court to impose costs on a party or an attorney who "fails to participate in good faith in the framing of a discovery plan by agreement," it fails to provide the same remedy for the abuse of other portions of the discovery process and eliminates all reference to 28 U.S.C. § 1927.[264] Presumably section 1927 sanctions are available, but the failure to provide an express reference in Rule 37 will make its use less likely.

It must be noted that the provision of a sanction in a rule is not the whole answer. Section 1927 has been the law since 1813, yet, there are very few reported instances of its utilization.[265] The cost sanctions of pre-1970 Rule 37 were used in only one of fifty cases.[266] And, while no exhaustive research has yet been published,[267] there is reason to believe that the situation has not changed appreciably since 1970.[268]

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[262] 1978 PROPOSED DRAFT, *supra* note 26, at 652; *see* ABA COMMITTEE, *supra* note 27, at 24-25. The Advisory Committee noted: "The new subdivision is offered to make explicit the power of the court to impose sanctions for all forms of discovery abuse." 1978 PROPOSED DRAFT, *supra* note 26, at 653 (Note to proposed Rule 37(e)).

[263] 1978 PROPOSED DRAFT, *supra* note 26, at 653 (Note to proposed Rule 37(e)). The Advisory Committee noted that, although the section 1927 sanction has been available to check discovery abuse, it has not been customarily used. *Id.* The explicit reference in Rule 37(c) apparently was designed to encourage district courts to utilize that sanction where appropriate.

[264] 1979 REVISED DRAFT, *supra* note 26, at 19.

[265] Act of July 22, 1813, ch. 14 § 3, 3 Stat. 21 (1813). *See generally* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 47-50 (1976). Professor Risinger notes that the statute did not figure in a reported case for over ninety years after its enactment, and then only peripherally. *See* Risinger, *supra*, at 47 n.158 (referring to *In re* Zier & Co., 127 F. 399 (D. Ind. 1904), *aff'd*, 142 F. 102 (7th Cir. 1905)). Professor Risinger describes the number of cases decided under the statute as "few." Risinger, *supra*, at 48. This is consonant with the Advisory Committee's conclusion that the statute is not "customarily used." 1978 PROPOSED DRAFT, *supra* note 26, at 653 (Advisory Committee Note to proposed Federal Rule 37(e)).

[266] FED. R. CIV. P. 37(a)(3), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. at 464 (1976).

[267] Such a study is now underway, at the direction of Professor Ronald Ellington of the University of Georgia, under the auspices of the Department of Justice's Office for Improvements in the Administration of Justice.

An analogous situation exists with Federal Rule 11, which requires counsel to sign all pleadings to certify they have "read the pleading, that to the best of [their] knowledge, information and belief there is good ground to support it; and that it is not interposed for delay."[269] Professor Risinger has concluded that, since its promulgation in 1938, there have been only eleven reported cases of Rule 11 violations.[270]

Should the proposed new Federal Rule 37(e) be promulgated, the responsibility for its effectuation will fall on district judges. Only they ensure that sanctions will deter discovery abuses. If the performance of district judges in applying 28 U.S.C. § 1927 and Federal Rule 11 is any guide, the proposed amendment to Rule 37, if adopted, will be no more than an interesting academic exercise.

CONCLUSION

This survey of local rules and of standing orders, instructions, and practices of individual federal judges shows that there has been a significant amount of experimentation designed to make the discovery rules better achieve the goal of "just, speedy, and inexpensive determination of every action."[271] Such experimentation has not, however, been without cost. As the subject matter of district court rulemaking has continued to expand, many courts have endangered "the principles of simplicity, scarcity and uniformity which guided the formulation of the Federal Rules,"[272] and have threatened to create "a kind of procedural Tower of Babel."[273] In an era in which lawyers often practice before federal courts in more than one district, the welter of local rules also increases the possibility that attorneys will not be aware of rules that "might well affect an attorney's trial tactics."[274] Moreover, as has been indicated, many of the local rules and practices of individual judges are inconsistent with the Federal Rules and hence are invalid.

The local rules and practice, however, do indicate areas of concern that have developed under the Federal Rules. They also demonstrate attempts to limit the involvement of judges in the discovery process and thus conserve judge time available for trial and more substantive motions. Clearly, this is consonant with the thrust of the

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[268] *See* Risinger, *supra* note 265, at 47-48.

[269] FED. R. CIV. P. 11.

[270] Risinger, *supra* note 265, at 34-42.

[271] FED. R. CIV. P. 1.

[272] Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1252 (1967)(footnotes omitted). For some concrete examples of this type of rules, see text accompanying notes 141-62, 178-84, 188-89 *supra*.

[273] 12 C. WRIGHT & A. MILLER, *supra* note 2, § 220.

[274] Weinstein, *supra* note 29, at 958 n.309.

1970 amendments to the Federal Rules.[275] Yet, there is a contrary impetus, one that brings federal judges, or federal magistrates, into greater involvement in the discovery process. For, in the views of many, allowing counsel to implement discovery largely on their own has led to too many instances of abuse, foot dragging, and unwarranted expense. Therefore, many local rules and individual judge practices call for greater involvement of judges and magistrates. This tendency may be seen in local rules requiring discovery conferences, delimiting the scope of discovery at an early stage, limiting the number of interrogatories without specific court authorization, and increasing the emphasis on sanctions.

The current proposals of the Advisory Committee, the ABA Committee, and the Second Circuit Commission also propose a significant increased investment in judge time to ensure that the discovery process works more expeditiously and less expensively. Although much of the increased supervision may be performed by magistrates or, as in the case of one Second Circuit Commission proposal, volunteer masters, the current proposals, by calling for increased supervision of counsel, reverses the philosophy behind the 1970 amendments to the federal discovery rules. This fact should be recognized and confronted.[276]

This survey of local rules and practices demonstrates that many of the proposals for changes in the national rules have been the subjects of experiments on the local level. In evaluating the probable effectiveness, impact, and costs of these proposals, it is therefore necessary to evaluate how similar rules and practices have been working on the local level. It is particularly important to balance the cost of local rules in terms of judge time against their efficacy in solving perceived problems. Apparently, the Federal Judicial Center's Case Management Study[277] played a significant role in the Advisory Committee's change of position from its 1978 proposals to its 1979 revised proposals for changes in the federal discovery rules.[278] Unfortunately, there is no indication that the Advisory Committee, the ABA Committee, or the Second Circuit Commission went further to evaluate local rules in arriving at the current proposals now before the bar. If such an evaluation was in fact made, its results have not been shared publicly.

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[275] *See* text accompanying notes 9-16 *supra*.

[276] Compare a suggestion made from time to time that a proposed congressional enactment carry with it a statement projecting its impact on the judiciary. Burger, *State of the Judiciary—1970*, 56 A.B.A.J. 929, 933 (1970).

[277] *See* note 62 *supra*.

[278] *See* 1979 REVISED DRAFT, *supra* note 26, at 5 (Advisory Committee Note to proposed new Federal Rule 26(f)). The Committee reported being impressed by the evaluation of the Case Management Study found in P. CONNOLLY, E. HOLLOMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978).

From this survey and from material gathered in the Case Management Study of the Federal Judicial Center, as well as from common experience of litigators, it is clear that the just administration of the civil discovery rules cannot be accomplished by any simple rubric that relegates discovery to counsel, that involves the court more or less, or that enacts ever more explicit sanctions. The proper implementation of the discovery process must instead be founded on a process of experience. This has been the history of the Federal Rules and of the local rules. Experience has demonstrated that the present scheme of minimal judge involvement in the Federal Rules does not work in the big and complex case. The *Manual for Complex Litigation*[279] recognized this failure and accordingly called for greater judicial involvement in complex cases. By emphasizing problems now perceived in the discovery process, particularly in big and complex cases, the Advisory Committee and the Second Circuit Commission have testified that the *Manual for Complex Litigation* has not been applied sufficiently by district judges or has not worked. Yet, they propose more of the same.

Finally, a recurring theme: for any set of rules to work there must be counsel who are willing to make them work, even at the expense of a client's interest. Thus, counsel's duty to the profession and to the litigation process must temper the classic view of devotion to one's client's interest "though the heavens fall."[280] Moreover, there must be a trial judge, or magistrate, alert to rules of the game and ready and willing to enforce them when breach occurs. Without these ingredients, no set of rules, federal or local, can be more than exhortation.

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[279] *See* note 118 *supra*.

[280] M. Freedman, Lawyers' Ethics in an Adversary System 9 (1975). Professor Freedman quotes Lord Brougham in Queen Caroline's Case, 129 Eng. Rep. 976 (1820) (quoting 2 Trial of Queen Caroline 8 (J. Nightingale ed. London 1821) (defense trial reported)):

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

Professor Freedman goes on to state,

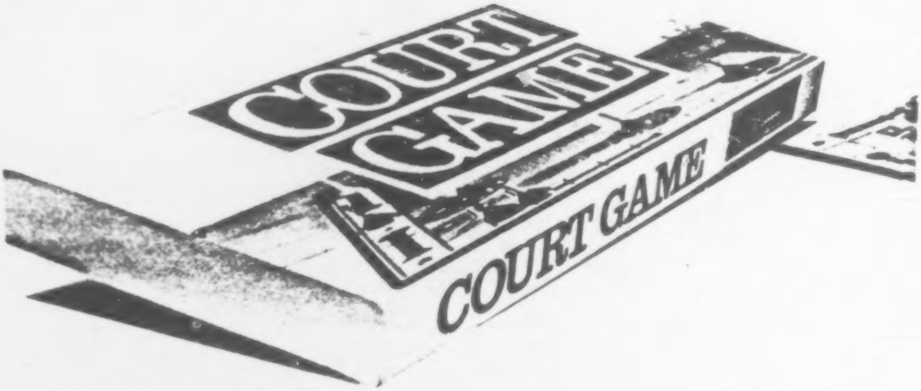
> Let justice be done—that is, for my client let justice be done—though the heavens fall. That is the kind of advocacy that I would want as a client and that I feel bound to provide as an advocate. The rest of the picture, however, should not be ignored. The adversary system ensures an advocate on the other side, and an impartial judge over both. Despite the advocate's argument, therefore, the heavens do not really have to fall—not unless justice requires that they do.

M. Freedman, *supra* at 9.

In praise of local rules

Local rules rarely conflict with federal ones, a researcher argues, and they tell attorneys what to do in unfamiliar situations.

by Steven Flanders



> *The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.*
> *—28 USC 2071*

> *Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.*
> *—Rule 83,*
> *Federal Rules of Civil Procedure*

Local rules may not be popular among scholars, but they are rarely criticized by those who practice in the federal courts. In treatises and law reviews, commentators have attacked almost every aspect of the power of district courts to promulgate local rules, but judges and lawyers often seem surprised to learn of this chorus of criticism. They consider local rules part of the landscape of federal practice, where a rule or two may need change but not the whole process of rulemaking.

In my opinion, the critics have gone far afield, drawing comprehensive conclusions from narrow and remediable abuses. It would be a mistake to suggest that the federal rules be changed to withdraw any part of this power from local courts when, for the

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Bright

most part, they use it to advantage. In fact, the problems are far fewer and the advantages far greater than most critics imagine.

In this article, I will argue that local rules do not undermine uniformity of national procedure significantly; that the problems that exist are exceptional and remediable, not systemic; that many of the criticisms against local rules do not stand up under close scrutiny; and that local rules constitute a very important tool for district court administration. My views are only preliminary because I have just begun to survey local rules as part of another project and to examine all specific criticisms of such rules.[1]

Confusion in diversity

The critics argue that nothing but confusion results from the present system. "Use by the lower courts of their local rule-making power . . . is for the most part an unmitigated disaster," Professor Charles Alan Wright recently declared.[2] Rule 83 requires local rules to be consistent with federal rules, and the Supreme Court forbids their application to "basic procedural innovations."[3] But Wright contends that courts have held many local rules invalid because they conflict with federal ones.[4] Other local rules remain on the books, Wright says, though they also conflict directly with national law.[5]

Wright and his coauthor, Arthur R. Miller, rely heavily on a Note from the Columbia

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[1] The previous project is described in Steven Flanders, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (Washington: Federal Judicial Center, 1977).

[2] Charles Alan Wright, review of Jack Weinstein, REFORM OF COURT RULE-MAKING PROCEDURES, 9 ST. MARY'S L.J. 657 (1978).

[3] Miner v. Atlass, 383 U.S. 650 (1960).

[4] Charles Alan Wright and Arthur R. Miller, 12 FEDERAL PRACTICE AND PROCEDURE 219. St. Paul: West, 1973.

[5] *Id.*

Law Review,[6] and a Comment from Duke Law Journal,[7] which until recently were the only general treatments of local rules. The Columbia commentator argued that, in promulgating rules, many courts disregarded "the principles of simplicity, scarcity and uniformity, which guided the formulation of the federal rules."[8] Sometimes district courts used their rule-making power to negate specific requirements of the federal rules, the author of the Note said. Other times, they used their power to "escape from the arduous but essential task of case-by-case analysis."[9]

Wright and Miller consider the problem so serious that they recommend severely restricting the local courts' rulemaking power. "The great goals of a simple, flexible, and uniform procedure in federal courts throughout the nation will be seriously compromised unless an effective check is put on the power to make local rules," they write.[10] They recommend that Rule 83 be amended to define limited areas where local courts may make rules—or that the Judicial Conference (or Standing Committee on Rules of Practice and Procedure) be required to approve any new local rules.

Other critics also see this same problem of confusion so long as district courts can make extensive local rules. "The federal courts of this country are becoming a kind of procedural Tower of Babel because of the differences in local rules" says Maurice Rosenberg of Columbia University.[11] "(M)any local rules are in conflict with the policy of simplicity which underlies the federal rules," says Raymond C. Caballero of the Texas bar.[12] "Practice under the federal rules should not be so varied that one would need local counsel."

One of the best-known critics, Judge Jack B. Weinstein, thinks the problem is snowballing. "The subject matter of local rule making continues to expand as local judges exercise their fertile imaginations to deal with perceived problems."[13] He also contends that "control of the local rulemaking power has been relatively ineffective."[14] Perhaps most important, he feels the courts have been irresponsible in promulgating local rules.

> Lack of public debate and publication of local rules before adoption is typical. . . . Mere publication is probably not enough. Members of the bar will generally not respond unless committees of the bar associations have studied the matters or the court itself appoints a committee or reaches out to invite persons who should be interested to attend a public hearing. . . . Nevertheless, the effort to involve the bar is wothwhile. In addition to valuable suggestions and prevention of inadvertent mistakes, a major advantage of involving the bar is that lawyers are more likely to accept the changes.
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> Private adoption without an opportunity to those affected to be heard is undesirable. No rule by a regulatory agency adopted after such a procedure could be permitted to stand.[15]

How much uniformity?

The sheer volume of federal rules and the number of issues they address is one of the commonest objections to local rules. However, the law requires each of the 95 federal courts to promulgate a local rule on several points, and on many matters nearly everyone agrees that local rules are needed and acceptable (bar admission, for example). Those facts alone assure one or two thousand rules altogether.

Courts also promulgate other rules in response to specific local problems. The Northern District of Alabama has established a rule regulating the procedure for removing files from the clerks office. How better would a district court deal with a problem like that than by promulgating a local rule? The court needs a policy, it needs to publicize the policy and it needs to make the policy easy to find. A local rule is the answer.[16]

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[6] Note, *Rule 83 and the Local Federal Rules*, 67 COLUMBIA L. REV. 1251-1276 (1967).

[7] Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011-1112.

[8] Columbia Note, *supra* n. 6, at 1252. Quoted in Wright and Miller, *supra* n. 4, at 217.

[9] *Id.*

[10] Wright and Miller, *supra* n. 4, at 223.

[11] *Hearings on S. 915 and H.R. 6111 before the Senate Subcommittee on Improvements in Judicial Machinery* (bills to establish a Federal Judicial Center), 90th Cong., 1st Sess. 282 (1967).

[12] Raymond L. Caballero, *Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts?* 24 FEDERAL BAR NEWS 325 (December 1977).

[13] Jack B. Weinstein, REFORM OF COURT RULE-MAKING PROCEDURES 120. Columbus: Ohio State U. Press, 1977.

[14] *Id.*

[15] *Id.*, at 129-130.

Much of the hostility to local rules comes from misplaced ideology to the effect that national uniformity is what the federal rules are really all about. Of course, this ideology has excellent historical roots: Charles Clark, who drafted much of the body of federal rules, certainly saw his handiwork in that light in substantial degree.[17] The "institutes" held after the rules were promulgated, the Knox Report, and the history of the rules themselves all reflect this very impressive tradition.[18]

The local rules taken together represent a contrary if unarticulated tradition, but a tradition quite compatible with the "national uniformity" ideology. The local rules as a body seem appealing and essential to a defender, but messy, offensive, or worse to their critics. I see the rules as a tool judges need in the day-to-day tasks of running a magnificent national structure—the Federal Rules of Civil Procedure and the rest—which has been superimposed on an extraordinarily diverse body of local and state practices and procedures. At their best, the local rules represent an effort to accommodate local practices into this national forum, to resolve and contain local conflicts and disputes—in short, to do the job the federal courts are for.

Local rules are a useful way for the federal system to gain experience with new approaches to court problems. Before a rule is adopted nationally, the standing committees of the federal courts can consider the experience other courts have gained (assuming the new rule is consistent with other law). For example, the committees may benefit from local experience with changes that restrict admission to the trial bar. Experiments with arbitration may also help national policymakers make decisions on this issue.

But before we consider further the usefulness of local rules, it may help to try to determine whether many of them really conflict with federal rules. This criticism seems to be the heart of the opponents attack, but it is not an effective one. It requires detailed treatment because appellate review of local rules is difficult and sporadic, as Weinstein and other commentators point out.[19]

Obsolescence

Some of the conflicts result from recent amendments to the federal rules. Take, for example, the 1963 amendment to Rule 58 of the Federal Rules of Civil Procedure, which forbids a district court to direct attorneys to prepare forms of judgment as a matter of course. Many courts, such as the Central District of California, maintain rules that require that "all appealable orders and all other orders orally announced in open court in any case, shall be prepared in writing by counsel for the successful party . . ."[20] But my search has not uncovered any such rule promulgated since 1963; they all seem to be vestiges of the years before the amendment.

Of course, the fact that they are unlawful does not foreclose their being enforced, as may be common. But this situation may have no practical significance since judges are free to require preparation of a form of judgment by the prevailing party in every case separately.

Or consider the rule by which some districts have fixed the amount in which a supersedeas bond must be given to obtain a stay pending appeal. "The appellate rules deliberately say nothing on the size of the supersedeas bond because they intended that this should be fixed individually by the court in each case," according to Wright and Miller.[21] Local rules that specify bond amounts, like some others, refer to a passage in former civil rules 72-76 that was dropped when the Federal Rules of Appellate Procedure were promulgated in 1967.

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[16] A committee in the Ninth Circuit, under Judge C.A. Muecke of Arizona is considering the possibility of a uniform numbering system for local rules. Professors Edward W. Cleary and Robert L. Misner of Arizona State University are conducting studies for the committee.

[17] Charles Clark, *Federal Procedural Reform and States' Rights; To a More Perfect Union*, 40 TEXAS L. REV. 211 (1961), reprinted in Charles Alan Wright and Harry M. Reasoner, eds., PROCEDURE—THE HANDMAID OF JUSTICE 99-114. St. Paul: West, 1965.

[18] The author of the Columbia Note describes these sources *supra* n. 6, at 1255-1259.

[19] Weinstein, *supra* n. 13 at 121.

[20] Rule 7(a), Central District of California. All local rules cited here are reproduced from *Federal Local Court Rules*, an occasional loose-leaf service published by Callaghan. Although the Federal Judicial Center has a more complete collection, I have limited references here to the service that is generally available.

[21] Wright and Miller, *supra* n. 4 at 242.

A vestige of a more distant past is the local rule which says that procedure in state courts may govern in the absence of any controlling federal rule.[22] Such rules common before FRCP were promulgated in 1938, are contrary to an intent of Rule 83. Its last sentence was meant to abolish the old Conformity Act, which had specified that state practice would govern federal procedure. Although any reference in current law to state practice must be a bit jarring, I have found no rule stronger on this point than two that simply advise that state practice *may* be applied if no other guide exists.[23]

It is true that local rules contain obsolete provisions. These may be no worse than sloppy, but they may also be misleading where they refer to provisions that have actually been changed. The revised national rule or statute would govern, of course, if it were identified.

A solution to this problem, however, is the one that districts such as Maryland and Northern Illinois use. There the clerk of the court performs a continuous review of local rules. Every district should assign a person to make this review regularly, for reasons of policy and to keep the rules up to date.

Serious conflicts

Some of the other conflicts that commentators have discovered are not so easily resolved. Possibly the most troubling provision is the requirement in at least three U.S. district courts that leave of court be obtained by an attorney who wishes to propound more than 20 (sometimes 30) interrogatories. Wright and Miller find this rule "flatly inconsistent" and "invalid."[24] Rule 26(b) (1) lays out a broad scope for discovery, with no suggestion of this type of restriction. More specifically, the first sentence of Rule 33 ("any party may serve . . . interrogatories . . .") could hardly be more clear.

The force of these provisions is the greater because Rule 33 was more restrictive before

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[22] Wright and Miller, *supra* n. 4 at 244.

[23] Civil Rule 15, Southern District, New York; Civil Rule 19, Northern District, Illinois.

[24] Wright and Miller, *supra* n. 4 at 8: § 2168.

Letting the bar write the rules

It may be that the bar is more often involved in rule-making than the critics suppose. One official who has worked with the process nationally told me that the bar, or at least several lawyers, is nearly always involved in drafting revised local rules.

An example of lawyer involvement in writing rules occurred recently in Arkansas. There, the two federal courts turned over the job of drafting new local rules to a statewide committee of lawyers. The committee included representatives of every type of practice. No judge or other employee of either court was a member. The rules were completed last summer.

Unfortunately, the chief judge has not felt he can promulgate these rules now because of Congressional inaction on the Omnibus Judgeship Bill. If he and his colleagues promulgate them, he reasons, the situation in a year or two would be that the local rules of the two districts would have been adopted by a minority of judges then sitting.

The committee proposed 52 quite comprehensive rules. To my knowledge, there was little or no discussion of the scholarly criticisms of local rule-making, though the committee had available existing rules from nearly all districts, and used commentary on particular points. Apparently, Arkansas lawyers are not pressing for massive reform of the rule-making power.

A similar process occurred in 1973 in Iowa, where drafting of common local rules for the two districts was coordinated by a Special Committee of the Iowa State Bar Association. The process and result are described in David J. Blair, "The New Local Rules for Federal Practice in Iowa," 23 DRAKE L. REV. 517 (1974).

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an amendment of 1970. Local rules that attempt to modify it depart from a steady evolution to loosen restrictions on interrogatories, and a specific, recently articulated, national policy.

Another group of rules that critics find offensive are rules such as Rule 20 of the Western District of Texas, which forbids an attorney from interviewing jurors after they reach their verdict, unless he obtains leave of court. Raymond C. Caballero calls this rule "facially invalid," but then presents an argument based only on policy grounds, and suggests that the rule's problems may actually result from implementation.[25] But no legal argument that I can find indicates that this very common rule is invalid. As far as policy goes, the facts recited in *U.S. v. Rocks*, 399 F.Supp. 249, a case which led to adoption of an identical rule in two affected districts, seem ample justification to me.

The "clearest examples" of conflicts that Wright and Miller have found are two provisions in the local rules of the First Circuit Court of Appeals. First Circuit Rule 8 provides that a case will be docketed as soon as the record is received, "notwithstanding" Rule 12 of the Federal Rules of Appellate Procedure, which requires the court to wait until the fee has been paid. First Circuit Rule 11(c) advises lawyers that the court will not consult portions of the record not included in the appendix. But FRAP 30 says "The fact that parts of the record are not included in the appendix shall not prevent parties or the court from relying on such parts."

But apart from these problems, do any other local rules conflict with federal ones? Not to my knowledge.[26] Though some local rules may be foolish, they are hardly illegal. For example, local rules that create "divisions" of a district not provided by statute seem remarkably unwise.[27] They not only create administrative problems, but they also may restrict venue following 28 U.S.C. 1393. I can see no useful reason for doing that.[28]

It appears also that few, if any, standing orders on discovery and other matters directly conflict with federal rules, though they may create a diversity of practice within several courts (particularly the Central District of California and the Eastern District of Pennsylvania, which I have studied intensively). But diversity of practice is an entirely separate question from that of conflicts.

The value of local rules

But we need not rely upon the relative absence of conflict to demonstrate the acceptability of local rules. We can make a positive case that local rules, far from burdening the bar, represent an essential mode of communication between bench and bar.

Even the critics agree that the federal rules provide only a skeleton, and leave open wide discretion to federal trial judges. Examples of the areas in which discretion is available are control of discovery, pretrial requirements, admission to the bar of a district, and local special problems of various sorts. There are also many issues on which statute or rule require or permit a local rule.[29] District judges and courts have established consistent policies on many such matters of inarguable discretion.

Diverse practice (within the range of permissible discretion) seems inevitable in the federal judiciary. It follows from the wide discretion available, from the high degree of independence accorded federal judges, and from the fact that the practice of law (despite some nationalizing tendencies) is localized to states and counties in a degree that has few parallels in other professions or sectors of the economy. Most important, the pattern by which federal judges are recruited assures that the judges have strong local or statewide ties.

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[25] Caballero, *supra* n. 12.

[26] There are several other candidates, but all are doubtful in some respect. To me, as to Wright and Miller and many others, six-man juries by local rule are the most serious abuse extant. However, the Supreme Court ruled otherwise in Colegrove v. Battin 413 U.S. 149 (1973).

A local rule that permitted oral argument on summary judgment motions only by leave of court was overturned [Dredge v. Perry, 338 F.2nd 456 (1964)]. I know of no such rule now.

Some matters still in dispute are mandatory bonds for foreign plaintiffs, the notice required in a dismissal by local rule, rules forbidding lawyers in class actions to contact class members, and permissible pretrial requirements.

[27] Rule 2 of the District of Montana for example. Rule 6 of the Eastern District of California and Rule 1 of the District of Arizona may present this problem to a lesser degree.

[28] *See, e.g.*, Rule 1 of the Southern District of Florida on "Docketing and Trial," which defines the place where each case shall be docketed and tried, and papers filed. Because this rule promises no ironclad assignment to a division (only to a jury division, a different matter), no venue difficulties can result.

[29] Wright and Miller, *supra* n. 4 at 217.

U.S. district courts hardly are field offices of any national apparatus, unlike other agencies that often share their buildings. Power in administrative matters lies in the courts themselves. Apart from obvious exceptions (especially resources), power does not flow from any Washington hierarchy. The policies and the incentives characteristic of this distribution of power generally reflect local or statewide practice to a significant degree.

Diverse practice is desirable as well.

> Because courts must respond to the environment in which they operate, they must remain flexible. Courts must be able to adjust to changes in case flow, particularly at the trial court level. The trial court is at the hub of a wheel which intersects with prosecutors' offices, private attorneys, litigants, juries, witnesses, lay groups, city and county governments. . . .[30]

A decentralized administrative structure that can respond to local needs is widely supported in recent management literature.[31]

Given diversity, it seems foolish to argue consistent policies should be somehow suppressed, rather than published. It was argued in the 1967 Columbia Note that Rule 83 confers a rulemaking power in its first sentence which is distinct from the "decisionmaking power" contained in its final sentence.[32] This distinction has been influential: it has been adopted in large part by most critics of the local rulemaking power, who assert that there is too much rulemaking, leaving too little to be decided on a case-by-case basis.

Framed this way, the attack on local rules seems simply silly even though the distinction is useful. Apparently there is a broad area to which judicial discretion extends, in which a judge may make an identical determination in every case as long as no rule is promulgated. (Presumably, the policy could be published in an opinion, but not a local rule.) A presumption against publication invites the evil many critics would remedy.

Local rules are no "booby trap" for foreign lawyers: the real booby trap is the local procedure that is *not* published. The late Chief Judge Mac Swinford used to say, "We don't have local rules in this court. Our lawyers know what we expect of them." That situation truly imposes a need for local counsel on foreign lawyers. Comprehensive local rules at least provide initial familiarity with local practice.

A useful tool

Rulemaking clearly cannot replace reasoned decision-making, but it can be an important channel of policy making. The courts are often criticized for imposing on other bodies policies based on scant information; they are seen as too ready to declare policy for others, especially public agencies.[33] But they sometimes seem hesitant to make policy for themselves.

A major theme in court management is that courts have done too little planning and policymaking with regard to their own operations.[34] Their reluctance is not surprising; rule- and policy-making are the opposite of their usual decisional mode of operation.[35] A rule defines future action on cases yet to appear; adjudication is based on a record built on past events. Where Judge Weinstein compares rule-making to legislation and finds the procedure wanting and the scope often improper, he has perhaps overlooked administrative policy-making as a more appropriate frame of reference.

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[30] David J. Saari, *Modern Court Management: Trends in Court Organization Concepts—1976*, 2 JUSTICE SYSTEM JOURNAL 23 (1967).

[31] *See, generally*, Saari, *Modern Trends* and Geoff Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUSTICE SYSTEM JOURNAL 35-55 (1976), and citations therein.

[32] *Supra* n. 6, at 1252

[33] *See, e.g.*, Nathan Glazer, *Towards An Imperial Judiciary?*, 41 THE PUBLIC INTEREST 104-123 (1975).

[34] A valuable source for this issue is Russell R. Wheeler and Donald W. Jackson, *Judicial Councils and Policy Planning*, 2 JUSTICE SYSTEM JOURNAL 121-140 (1976).

See also Russell R. Wheeler, *Planning in the State Courts* and Donald W. Jackson, *Program Evaluation in Judicial Administration*, in Larry C. Berkson, Steven W. Hays, and Susan J. Carbon, eds., MANAGING THE STATE COURTS 337-356. St. Paul: West, 1977.

[35] Weinstein, *supra* n. 3, chapter 1.

Looking at rules as a part of policy helps answer a few questions but raises others. If rules are an essential part of running a court and charting its future, it is beside the point to complain of their number or scope. Local rules can define and regulate practice on certain matters of the normal operation of the courthouse.[36] They can define the routine to govern important elements of the conduct of litigation.[37] They can provide information about statutory plans,[38] and they can describe the administrative organization of the court.[39]

Many U.S. courts, in my view, make too little effort to take advantage of local rules as a device to hammer out agreement on court-wide procedural policies. The result is that many rules are the pet projects of a few judges, and have no bearing at all on the activities of many or most. Also, the rules are often narrower in scope than they should be.

Diversity among courts seems unavoidable. Because judges on any particular court differ from one another in their history, training, and attitude to procedural questions, diversity *within* a court is probably inevitable as well. The most common complaint I have heard from lawyers is the difficulty in practicing law where procedures differ widely from judge to judge.[40] Among the 10 courts we visited for a district court research project, some had done a remarkable job in hammering out consistent policies which all judges could live with on most of the day-to-day procedural questions a lawyer faces. Those, however, were the few not subject to this complaint.

Two questions

As this larger context is explored, two difficult questions probably will be illuminated—questions which, I am frank to say, I cannot confidently answer now. The first concerns how far rule-making can extend and not intrude on decision-making. I have tried to show that a minimalist position will not do. On the other hand, it cannot be that any consistent and lawful action of a court is suitable for transmutation into a rule.

Though nearly all prisoner petitions are dismissed as frivolous, for example, it does not follow that this result represents a policy. Thus, no court should promulgate a rule that "All prisoner petitions filed in this district shall be dismissed as frivolous." Courts must read every petition; if most are dismissed, that cannot be a matter of policy, determined in advance. The critics would have us believe that many local rules commit this error. While I think that is demonstrably untrue, all of us need further definition of the desirable scope of court policy. It must be broad enough to help courts do their jobs well, now and in the future. It must not pre-empt adjudication of controversies.

My second open question is how far a court should go in trying to bind judges who dissent from a local rule. Rule 83 requires only a majority of district judges when a rule is created. When we realize also that new judges will be appointed who did not vote we find, in toto, many judges who may not support a rule. Enforcement is difficult, though no more so than for national rules. In general, perhaps courts should avoid promulgating a rule unless dissenting judges feel they can live with it, and rules should be reopened as new judges are appointed.

Recommendations

Once we understand the significance of the local rule-making power, it is still possible to criticize several aspects of the exercise of this power. The first is the way in which the rules are drafted, the second the way in which they are promulgated; the third is the lack of binding power of the rules themselves; and last—and most important—is the occasional lack of consistency with national law.

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[36] *See, e.g.*, Rule 6 of the Northern District of Alabama on "Removal of Court Files and Exhibits."

[37] *See, e.g.*, Rule 3 of the Eastern District of Louisiana on "Motions." It covers motion days, setting motions for hearing, and calendar.

[38] *See, e.g.*, Rule 21 of the Northern District of Florida on "Court Plans," which covers a plan for the assignment of counsel to represent indigent defendants in criminal proceedings, a plan for the random selection of grand and petit jurors and a plan to minimize undue delay and further prompt disposition of criminal cases (Speedy Trial Act).

[39] *Supra* n. 28.

[40] *Supra* n. 1. This point is made also in the "Report Evaluating the Individual Assignment System in the Southern District of New York After Three Years Experience" (Assn. of the Bar of the City of New York, July, 1975), pp. 5-6.

Consultation: Judge Weinstein and others are rightly concerned about the manner in which local rules are drafted, reviewed, and promulgated. He argues that rule-making is to be understood and evaluated under theories of legislative delegation, and finds it wanting from that perspective. He recommends hearings, notification, and a substantial opportunity for comment.[41] I find all this useful and probably inarguable. However, I have some doubt that local rules that simply do what local rules should—to codify existing policy or practice that is consistent with higher levels of law—need to be dealt with or evaluated through the imposing intellectual apparatus Judge Weinstein brings to bear on them. But it certainly seems good practice for any government agency to provide an opportunity for public comment before drafting regulations, as most agencies are required to do by the courts.

Promulgation: If a district has a lawful, consistent, and predictable policy, a positive service is performed by publishing a concise and useful description of that policy. If court-wide procedures are to be publicized, local rules seem the best way, by contrast with general orders or some other form that stops short of the formal local rule.

In his discussion of the implications of rule-making, Judge Weinstein argues that rule-making should be conservative and accurately describe practice, but he does not seem to offer any good alternative to local rules as a means to publicize local practice.[42] A uniform numbering system, which may be forthcoming, would be very desirable.[43]

Some districts have a vast proliferation of "general orders," whose status is unclear and whose distribution is spotty. The Central District of California has 181, in three large volumes. Of course, it is impossible to obtain a national collection of general orders. One reason I am wary of excessive consultation and review prior to promulgation is I would avoid procedures that make it difficult to promulgate a local rule.

Binding power: The judiciary appears to have a rather casual attitude toward local rules, particularly in the notion that the judge is not bound by them. Wright and Miller think local rules should be binding on the parties *and* the court, but that view is probably not widespread among judges.[44] Many local rules that impose pretrial requirements are enforced rigidly by some judges and only sporadically (or not at all) by others. A local rule should be generally consistent with actual practice of the court it governs (though it may be waived in a particular case) or it should be withdrawn.

Consistency: There *are* a number of direct conflicts. Although they have less cumulative force than the critics think, their existence certainly is troubling. It would appear wise for district courts to be conservative in future rule-making and eliminate existing conflicts. In particular, it would be wise to forego excursions along the lines suggested by the ABA Litigation Section, in their proposal that substantial modifications of discovery practice be adopted by local rule.[45]

Conclusion

What district courts should do in this area can, I think, be simply summarized. A district should maintain the most comprehensive possible body of local rules, provided that those rules meet the following standards, they should: (1) be lawful; (2) describe actual practice; (3) describe something attorneys need to know about; and (4) be promulgated following a process that provides a reasonable opportunity for participation and comment by the bar.

With those conditions, I think that the exercise of the local rulemaking power offers the federal district courts one of their best tools for responding to problems that national rules simply cannot address. ☐

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[41] Weinstein, *supra* n. 13, at 151.

[42] Weinstein, *supra* n. 13.

[43] *Supra* n. 16.

[44] Wright and Miller, *supra* n. 4 at 224.

[45] *See*, "Report of the Special Committee for the Study of Discovery Abuse" (American Bar Association Section on Litigation, October, 1977). At a 1977 session of the Conference of Metropolitan District Chief Judges (Brownsville, Texas, October, 1977), a section member suggested that several of the proposals be adopted by local rule. He especially suggested a limitation of 30 interrogatories, unless leave of court is obtained.

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Computer Discovery in Federal Litigation: Playing by the Rules

Pretrial discovery, especially in complex litigation, often requires attorneys to maintain and manipulate numerous documents containing large quantities of data. To assist attorneys in organizing and using this material effectively, law firms are turning with increasing frequency to computer technology.[1] Recognizing this trend, commentators have written enthusiastically about the use of computers in litigation.[2] Very little of the literature, however, discusses the unique questions that computers pose for pretrial discovery.

One such question concerns the computer's potential for abuse. The speed and data management capabilities of computers enable an attorney not only to obtain information quickly but also to bury his opponent beneath reams of paper.[3] Computers also present new questions about compliance with discovery requests. Should a court, in the interest of quick and efficient litigation, order a party to use his computer for discovery? If the court orders the use of a computer, which party should bear the costs? In what form must a party present information derived from his computer? Finally, do the privileges that apply to manually kept records apply in the same manner to records stored on a computer?

This note provides answers to these questions. Because of the ready applicability of the Federal Rules of Civil Procedure to computer-aided discovery, the answers are actually quite simple. Simple resolutions, however, provide welcome relief to the litigator confronted with the confusion of issues and occasionally incorrect results found in the case law.[4] Indeed, much of the

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[1] *See* The American Lawyer, Nov., 1980, at 27, 36 (computers will become increasingly sophisticated and less expensive permitting even small firms to purchase them). *See generally* Smith, *Automating For the Eighties*, 66 A.B.A. J. 304 (1980) (during 1980's computer prices will decline bringing automation to firms of all sizes). An indication of the widespread use of computers by the legal profession was the appearance of a special supplement on computers and litigation in a major metropolitan legal newspaper; Legal Times of Wash., Nov. 17, 1980, at 29, *passim*.

[2] As a general rule, articles dealing with computer litigation explain either the countless ways a computer can help a litigator or how a computer will benefit a particular law office. *See generally* USE OF COMPUTERS IN LITIGATION (J.H. Young, M.E. Kris & H.C. Trainor eds. 1979) (collecting articles on computers and litigation) [hereinafter COMPUTERS IN LITIGATION]; The American Lawyer, Nov. 1980, at 27, *passim* (discussing increased use of computers by major law firms for variety of legal and data processing applications); Note, *The Impact of Computers on the Legal Profession*, 30 BAYLOR L. REV. 829 (1978) (discussing computerized research, litigation support, and discovery and admissibility of computerized information).

[3] E. HUGH KINNEY, LITIGATION SUPPORT SYSTEMS: AN ATTORNEY'S GUIDE § 5.20 (1980) (counterdiscovery strategy of "massive response" places requesting party on defensive in terms of time and money) [hereinafter LITIGATION SUPPORT SYSTEMS].

[4] *See* Sanders v. Levy, 558 F.2d 636, 648-649 (2d Cir. 1976) (en banc) (because more difficult to extract shareholder names from defendant's computer files than from other files, defendant rather than class representative must pay costs of notifying class members), *rev'd sub nom.* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 362-63 (1978) (no reason to penalize defendant for storing files on computer because equally expensive to extract information from other files); *In re* Japanese Antitrust Litigation, 494 F. Supp. 1257, 1259-60, 1263 (E.D. Pa. 1980) (reversing itself, court ordered production of computer tapes after noting earlier confusion over their work product status); Pretrial Hearing Transcript at 71, *In re* IBM Peripheral EDP Devices Antitrust Litigation, 5 COMPUTER L. SERV. REP. 878 (N.D. Cal. 1975)

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confusion has occurred because courts and litigators have focused myopically on the workings of the computer and have refused to see the ease with which the ordinary rules of discovery apply.[5]

Litigators and judges faced with computer discovery issues should recognize one essential point: the information stored on the computer, and not the computer itself, is the focal point of the inquiry. Other than a rudimentary understanding of the way in which computers operate, the only requisite to satisfactory solutions is a careful application of the Federal Rules of Civil Procedure. Litigators and courts should avoid the common problem of becoming so entangled in computer issues as to forget the most important question: is the information sought properly discoverable under the Federal Rules of Civil Procedure?

This note illustrates the ready applicability of the Federal Rules of Civil Procedure to computer-aided discovery. After briefly explaining computer concepts and terminology, the note discusses how computers affect five general areas of the discovery process: the preservation of information prior to trial; compelling a litigant to use his computer; the information the computer should provide; the form requested information should take; and the proper allocation of computer discovery costs. This note offers interpretations of the rules to solve problems that the courts have yet to confront. In addition, the note analyzes problems that the courts have addressed inappropriately and demonstrates how the rules, when correctly applied, adequately resolve issues of computer discovery.

I. COMPUTERS AND LITIGATION: AN OVERVIEW

The computer is valuable to a litigator because it can search through and sort large quantities of data in a short period of time. An attorney can use this capability to organize and store information so that he quickly can locate and assemble needed pieces of evidence, such as all documents discussing a given

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(believing that use of computer would result in disclosure of work product, court denied plaintiff's motion for order directing IBM to use computer to speed document production); *cf.* Donaldson v. Pillsbury, 554 F.2d 825, 832 (8th Cir. 1977) (without deciding issue, appellate court implied that district court erred by refusing to allow discovery of computer-readable material).

[5] An example of this overemphasis appears in *In re* IBM Peripheral EDP Devices Antitrust Litigation, 5 COMPUTER L. SERV. REP. 878 (N.D. Cal. 1975). In that case, the judge and the attorneys became involved in a complex dialogue about work product and the defendant's computer. *See generally* Pretrial Hearing Transcript at 52, *In re* IBM Peripheral EDP Devices Litigation, 5 COMPUTER L. REP. 878 (N.D. Cal. 1975). Consequently, they failed to realize that plaintiff wished IBM to use the computer only for the purpose of speeding document production and not as a subterfuge to discover work product. Consider the following exchange:

> The Court: I have the greatest feeling that one side is talking about one thing and the other about another.
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> . . . .
>
> You say if you comply with this, all your work product is to be released. They say, "we don't want the work product." They say, "We want them to push the button as to what documents have been previously selected to do this, and this will create a saving in time and effort."
> Counsel: I can understand your Honor saying it seems to you like ships passing in the night.

Id.

point.[6] Computers can also supply attorneys with calculations, cost-benefit and accounting analyses, and market share projections.[7]

Because computers are such valuable tools, attorneys should acquire some *basic* familiarity with them. A computer is similar to a vast filing cabinet having an automatic retrieval system. *Data bases*, the electronic equivalent of filing drawers, contain *data*, information gleaned from documents, conversations, and the like.[8] *Programs*, sets of instructions written in a language the computer can understand, tell the computer how to manipulate data in the data base to accomplish a specified task.[9] *Software*, the generic term for programs,[10] describes the programs purchased from the computer's manufacturer[11] as well as those written by the user. Programs draw information from the computer's *memory*[12] and manipulate it in the *central processing unit* (CPU)—the computer's brain.

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[6] For an excellent discussion of the uses of computers in litigation accompanied by a detailed "how to" guide on creating a litigation support system, see LITIGATION SUPPORT SYSTEMS, *supra* note 3. *See also* Halladay, *Anatomy of an Automated Lawsuit*, LITIGATION, Spring, 1977, at 13 (describing tremendous savings in time and money resulting from use of electronic litigation file during 135-day trial); Sanders, *Employment of Litigation Support Systems in Preparation of a Products Liability Case*, 11 FORUM 919 (1976) (discussing advantages of computer use in litigation, but noting that even litigation systems require substantial attorney time).

[7] *See* LITIGATION SUPPORT SYSTEMS, *supra* note 3, §§ 10.30-10.33 (in addition to searching and sorting, computer may be used for computing damages, predictive modeling, and numerical, network, and statistical analyses).

Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. 1122 (S.D. Tex. 1976), is an example of the sophisticated way in which computers can be used in litigation. In *Pearl Brewing*, an antitrust suit, plaintiffs hired consultants to construct a computerized econometric model, designated the "Texas Beer Market Model," to simulate market conditions. *Id*. at 1134. Information produced by the model would be passed through a Damage Assessment Program, which would estimate the plaintiff's losses that resulted from the defendant's anticompetitive activity. *Id.*

[8] The computer as "filing cabinet" is, of course, only an analogy. In reality, computers store data as a series of magnetic spots on a medium such as tape. LITIGATION SUPPORT SYSTEMS, *supra* note 3, App. 1 at 396. A data base is a collection of data that relates to the same subject and is stored together. *Id*. § 10.18. Thus, inventory and payroll data, although stored in the same computer, would appear in separate data bases. Analogously, an attorney using a computer for litigation support might create a separate data base of evidence and documents for each case or, if a case is very complex, for each major issue. *Id*. § 10.22.

The segregation of information into discrete data bases causes problems when a party seeks to discover information scattered among several data bases. Often new programs must be written to assemble the desired information. *See* Sanders v. Levy, 558 F.2d 636, 648-49 (2d Cir. 1976) (necessary to develop special computer program to extract shareholder information sought by discovering party), *rev'd sub nom.* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978). Another solution to this problem is the use of sophisticated data base management systems. *Cf.* LITIGATION SUPPORT SYSTEMS, *supra* note 3, §§ 10.18-10.26 (discussing construction, testing, use, and maintenance of data base management systems); Sherman & Kinnard, *The Development, Discovery, and Use of Computer Support Systems in Achieving Efficiency in Litigation*, 79 COLUM. L. REV. 267, 268-71 (1979) (discussing advantages and disadvantages of full-text and index systems used in litigation data bases) [hereinafter *Computer Support Systems*].

[9] *See* LITIGATION SUPPORT SYSTEMS, *supra* note 3, § 10.06 (programs consist of series of statements in some well-defined language setting forth step-by-step problem-solving procedures). Programs are written using either incomprehensible strings of numbers known as machine language or an English-like high-level language. *Id.* § 10.07.

[10] *See id.* App. 1, at 396 (software consists of programs, procedures, and documentation concerning operation of computer system).

[11] *See id.* § 4.26 (commercially-prepared data base management software generally allows for creation, maintenance, and searching of text files).

[12] COMPUTERS IN LITIGATION, *supra* note 2, at 12 (internal memory stores program being run and

A computer communicates with the world outside itself through *peripheral devices* such as magnetic tape drives, disk drives, punch card readers, video terminals, and printers.[13] Because each of these devices stores information in a different form, the user must choose the device that will produce information in the form best suited to his purposes.[14] Thus, an attorney must determine what device to use for *output*—the information the computer produces.[15]

Litigators generally will encounter two types of computer systems.[16] Companies and other potential parties to litigation use *business-record systems* to perform accounting, payroll, or inventory control, in order to enhance the efficiency of their business. Because many companies use computers rather than traditional file cabinets to store information, litigators should be familiar with business-record systems so they will be able to employ discovery effectively. Litigators should have an even greater understanding of *litigation systems*—computer systems that law firms use to store and organize materials pertinent to a given case.[17] Because litigation and business-record systems deal with different types of information, they raise different issues that this note separately analyzes.

The foregoing discussion supplies the information and vocabulary necessary for courts and litigators to understand most discovery requests involving computers.[18] Of all this information, two distinctions are especially significant. First, litigators and courts must understand the distinction between software and data bases. Data bases contain information about the business practices of the company using the computer. Software, however, contains information relevant only to the internal workings of the computer. As a result, discovering parties usually seek discovery of data bases rather than software.[19] The second significant distinction is that between business-record

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data being processed). For a discussion of a computer's information storage and memory organization, see *id.* at 50-51.

[13] *See id.* App. 1, at 391.

[14] Thus, if the attorney intends to read the information the computer produces, it must take the form of computer printouts. Alternatively, if the attorney wishes to send the information to another computer for analysis, he must store it on a machine-readable medium such as tape, disk, or punched cards.

[15] LITIGATION SUPPORT SYSTEMS, *supra* note 3, App. 1 at 390 (output refers to processed data stored outside computer's own memory).

An attorney must also consider other factors such as speed and cost when choosing a peripheral device for output. Thus, information stored on a disk can be obtained more quickly than that stored on tape. Disk storage, however, is much more expensive than tape storage. As a general rule, the more readily one can obtain information, the more it costs to store.

[16] In computer parlance a "system" is the entire set of software that accomplishes a unified purpose. For example, an accounting system would be the combination of a ledger program, an accounts receivable program, and whatever other programs were necessary to perform a business' accounting tasks. M. WEIK, STANDARD DICTIONARY OF COMPUTERS AND INFORMATION PROCESSING 345 (rev. 2d ed. 1977).

[17] *See* COMPUTERS IN LITIGATION, *supra* note 2, at 159 (litigation systems store and manage large quantities of information enabling attorney to access quickly and accurately all pertinent documents) (reprinting L.H. Vovokis, *Litigation File Management: Preparation for Trial*, 11 FORUM 820 (1976)). For a particularly clear presentation of background information about litigation systems, see LITIGATION SUPPORT SYSTEMS, *supra* note 3 (in-depth discussion of all aspects of computer support systems); *Computer Support Systems*, *supra* note 8 (explaining briefly the function of litigation support systems, with emphasis on work-product issues).

[18] Dictionaries of data processing are an excellent source of additional information and terminology. *See generally* M. WEIK, STANDARD DICTIONARY OF COMPUTER AND INFORMATION PROCESSING (rev. 2d ed. 1977); LITIGATION SUPPORT SYSTEMS, *supra* note 3, App. 1 (glossary of data processing terms).

[19] Occasionally, however, software contains information a party may wish to discover. Thus, a small

systems and litigation systems. The discovery analysis varies depending on whether the requested information is stored in a business-record or litigation system.

II. COMPUTER DISCOVERY

Once litigators master the basic concepts and vocabulary of computers, they are ready to approach the problems posed by the use of computers in discovery. This note now proceeds to examine a sampling of computer discovery issues in a manner that roughly tracks the course of litigation. Initially, the note discusses the problem of data preservation prior to discovery. Next, the note examines the question of computer use during discovery and suggests that a court has the power to compel a party to use his computer. After discussing the application of the work-product privilege to various types of computerized information, the note demonstrates that courts may require parties to produce material in machine-readable form. Finally, the note discusses how courts should allocate the costs of computer discovery.

A. PRESERVING DATA PRIOR TO DISCOVERY

In any litigation, there is some possibility that an opposing party, either in bad faith, unintentionally, or in the regular course of business,[20] might destroy information having evidentiary value, regardless of the form in which it is stored.[21] Nevertheless, the risk of destruction is greater for computerized information than for written documents because computers lack many of the safeguards that written documents possess. The alteration or destruction of reams of paper is time consuming and requires so much manpower that a dishonest litigant will have difficulty destroying evidence without witnesses.[22]

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company suing a supplier for price discrimination may wish to inspect computer programs producing bills to determine how the supplier calculates his prices. *See* note 82 *infra* and accompanying text (discussing case involving discovery of program that allegedly contained racially discriminatory standards).

[20] *See* Exxon Corp. v. FTC, 411 F. Supp. 1362, 1366 & n.5 (D. Del. 1976) (oil companies employ "document retention programs" involving systematic destruction of certain records once they reach specified age); United States v. IBM, 58 F.R.D. 556, 558-59 (S.D.N.Y. 1973) (in violation of pretrial preservation order but pursuant to settlement agreement in another case, defendants in government antitrust suit destroyed evidence prepared by private antitrust plaintiffs). *See also* LITIGATION SUPPORT SYSTEMS, *supra* note 3, § 5.19 (suggesting that to prevent discovery of computer material, businesses destroy it when it is no longer needed). As *Exxon* demonstrates, document destruction does not invariably evince bad faith. Regardless of motive, document destruction does impede an opponent's efforts to obtain discovery.

[21] The intentional destruction of documentary evidence constitutes a serious breach of professional ethics and a violation of the law. *See* Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME LAW. 5, 57 (1980) (in some situations attorney counseling document destruction may be guilty of breach of legal ethics). Despite this ethical consideration, document destruction still occurs. Recognizing this problem, this note discusses document destruction not as a norm to be followed but as an aberration to be controlled. The preservation order discussed in the text provides one means of control.

[22] *See* Wash. Post, March 18, 1981, § D, at 1, col. 8 (witness alleged that AT&T destroyed documents claims she saw "six or seven large wastebaskets being filled . . . and taken away by trash collectors"). Unlike document destruction, the destruction of computerized information requires no wastebaskets or trash collectors. A single individual with fifteen minutes to spare can, by erasing a tape, destroy the equivalent of thousands of documents.

Furthermore, a litigant who doubts the integrity of documentary evidence often can call on an expert to determine whether any documents have been modified.[23] Because computerized records lack traditional safeguards, a person can alter or destroy data in a data base without leaving a trace of the modification.[24] Moreover, the alteration or destruction of a data base may be done quickly and effortlessly: even a single knowledgeable individual can obliterate potentially damaging information.[25]

Use of preservation and duplication orders might eliminate the problem of data destruction. Computers can duplicate information almost as quickly as they can destroy it.[26] Moreover, the large storage capacity of magnetic tapes and disks, coupled with their relatively small size, makes feasible the duplication of even very large quantities of data.[27] Given these advantages, a judge can ensure the preservation of computerized information by ordering the parties to copy all relevant data and store them under seal with the court.[28]

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[23] *See generally* H. SULNER, DISPUTED DOCUMENTS (1966) (fundamental text on tools and techniques employed by document experts); A.S. OSBORN, QUESTIONED DOCUMENTS (2d ed. 1929) (same).

[24] *See* MANUAL FOR COMPLEX LITIGATION § 2.716, at 115 (1977) (because computer file can be altered without trace, courts should not admit computer records unless satisfied that evidence trustworthy).

[25] United States v. IBM, 58 F.R.D. 556 (S.D.N.Y. 1973), illustrates how rapidly a party may destroy computerized information and how difficult it is to recover what has been lost. In *IBM* the trial court ordered IBM and the Government to preserve all documents relating to data processing. *Id.* at 557 & n.1. While this order was in effect, IBM settled a private antitrust suit with Control Data Corporation (CDC). *Id.* at 558. As part of the court-approved settlement in the CDC case, CDC, in the course of a single weekend and under the watchful eyes of IBM's counsel, destroyed the magnetic tapes, printouts, and data base it had prepared for the case. *Id.* The Government in *IBM* alleged that IBM's conduct violated the terms of the *IBM* preservation order. *Id.* at 557-58. After finding that IBM had violated the order, the *IBM* court ordered the company to produce for *in camera* inspection any remaining evidence in order to facilitate reconstruction of the data base. *Id.* at 559-60. The Government had asked the court to order IBM to pay the full costs of reconstructing the data base. *Id.* at 558-59. The court refused to grant such relief on the ground that requiring payment of the costs of reconstructing the data base would be tantamount to ordering the production of work product material that had been contained in the destroyed evidence. *Id.*

[26] Because computers can search records more quickly than people can, delay results when a party with computer capability does not use his computer. Some statistics on computers, set forth by a judge almost twenty years ago, dramatize how fast a computer operates: "For a machine now capable of making 240,000 additions per second, reading magnetic tape containing 4 1/2 million digits of information on a single reel at a breath-taking speed, to speak of the shop rule book is, indeed, an anachronism." Brown, *Electronic Brains and the Legal Mind: Computing the Data Computer's Collision with Law*, 71 YALE L.J. 239, 248 (1961). Those figures are slow in comparison with the capabilities of today's hardware. *See* Rubin, *The Application of Full Text Retrieval to Litigation Support*, 11 FORUM 1136, 1137 (1935) (in less time than it takes human to read single paragraph, computer can search text of 50,000 documents for specified terms). For example, a computer can write or read data on a magnetic tape at the rate of 15,000-350,000 characters per second; the transfer rate for disks is 100,000-225,000 characters per second. COMPUTERS IN LITIGATION, *supra* note 2, at 14.

[27] For example, a magnetic tape can store up to 20 million characters, and a disk can store up to 7 million characters. *Id.*

[28] The suggested order actually consists of two orders. The first, the preservation order, was discussed in the context of the *IBM* case. *See* note 25 *supra*(discussing IBM's destruction of computerized evidence in violation of preservation order). Closely analogous to a preservation order is the court's power to order parties to seal and store evidence with the court. *See, e.g.*, FDIC v. Mercantile Nat'l Bank of Chicago, 84 F.R.D. 345, 350 (N.D. Ill. 1979) (rather than forcing defendant to comply with overbroad subpoena, court

Although rule 26(c) never explicitly discusses preservation orders, it apparently grants courts the power to enter such orders. Rule 26(c) allows the trial judge, upon "good cause shown," to issue any protective order "which justice requires to protect a party or person from annoyance, embarassment, oppression, or undue burden or expense."[29] Moreover, a judge has broad powers under the rule.[30] The court, upon motion by a party, might issue the order whenever the moving party shows that there is reason to believe that data tampering or data destruction will occur. A stronger showing is unnecessary because the magnitude of harm resulting from data destruction far outweighs the relatively minor expense of duplication.[31] If the party required to preserve evidence seeks to avoid the preservation order on the ground that the cost of compliance is burdensome, the court might take the

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agreed to store information and limit access to it); Brink v. Dalesio, 82 F.R.D. 664, 677 (D. Md. 1979) (court properly exercised broad discretion over pretrial discovery when it sealed records and allowed discovery to continue; ordering seal effectively balanced defendant's fifth amendment rights against plaintiff's need for discovery); Flora v. Hamilton, 81 F.R.D. 576, 579-80 (M.D.N.C. 1978) (to protect individual's interest in privacy, court limits discovery by requiring psychiatric records to be placed under seal).

The second order contained within the order suggested in the text is a *duplication* order. A court clearly has the power to issue duplication orders. *See* Flora v. Hamilton, 81 F.R.D. at 580 (plaintiff must copy medical records and file sealed copy with court). Moreover, a court that has ordered storage of original documents with the court probably should issue a duplication order to ensure that the parties do not suffer the inconvenience of losing access to the documents.

[29] FED. R. CIV. P. 26(c).

[30] The decision to issue a protective order is wholly within the discretion of the trial judge. Aluminum Co. of Am. v. United States Dep't of Justice, 444 F. Supp. 1342, 1346 (D.D.C. 1978). Acting within the scope of this discretion, the trial judge determines how much protection, if any, the party requires. Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973). The trial judge may be reversed only on a clear showing of abuse of discretion. *Id.* Wright and Miller's belief that the judge is not limited to specifically enumerated orders further supports the proposition that rule 26(c) empowers a judge to issue preservation orders. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2036 (1970) (court "may be as inventive as the necessities of a particular case require" when issuing protective orders) [hereinafter C. WRIGHT & A. MILLER]. Moreover, several courts have issued such preservation orders. *See* FDIC v. Mercantile Nat'l Bank of Chicago, 84 F.R.D. 345, 350 (N.D. Ill. 1979) (defendant ordered to halt regular file destruction process); United States v. IBM, 58 F.R.D. 556, 557 & n.1 (S.D.N.Y. 1973) (court entered pretrial order requiring parties to "preserve and secure" from destruction all documents relating to data processing); *cf.* Exxon Corp. v. FTC, 411 F. Supp. 1362, 1379-80 (D. Del. 1976) (court vacated broad preservation order but remanded with instructions to agency to develop more narrowly-tailored order).

Yet another rule reinforces the court's power under rule 26(c). Rule 83 permits district courts to "regulate their practice in any manner not inconsistent with these rules." FED. R. CIV. P. 83; *cf.* Colgrove v. Battin, 413 U.S. 149, 163 (1973) (local rule calling for six-member jury in civil cases permissible because not inconsistent with federal rules). *See also* Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253 (1979) (discussing regulation of discovery by means of local rules promulgated under rule 83).

Although rule 26(c) confers on judges powers broad enough to encompass the issuance of duplication/preservation orders, changing technologies, such as computers, have required judges to be innovative in the exercise of their powers. *See* Dellums v. Powell, 561 F.2d 242, 250 (D.C. Cir.) (pursuant to rule 53, court appoints special master to review Nixon tape recordings and transmit relevant information to court), *cert. denied*, 434 U.S. 880 (1977); *In re* "Agent Orange" Product Liability Litigation, 28 Fed. R. Serv. 2d 993, 995 (E.D.N.Y. 1980) (permissible to use videotape to perpetuate testimony and demeanor of witness expected to die of brain tumor before trial).

[31] A party would probably encounter more difficulty obtaining a preservation order for manually maintained records. *See generally* notes 20-25 *supra* and accompanying text. Although the magnitude of harm is the same for destruction of manual or computer records, there is less risk that manually-maintained records will be destroyed without detection. In addition, the cost of copying manual records probably exceeds the cost of duplicating computer records.

additional step of requiring the discovering party to pay the duplication costs.[32]

B. COMPELLING COMPUTER USAGE DURING DISCOVERY

Once a litigant has obtained the preservation and duplication orders necessary to protect computerized evidence under his opponent's control, he must decide how he will use his and his adversary's computer during the discovery process. One might assume that all litigants would prefer to use their computers for the sake of enhanced data manipulation capability, accuracy, and speed. This, however, is not the case. Delay is a common trial tactic,[33] and a party may delay proceeding to trial by refusing to use a computer when answering interrogatories. On the other hand, the interrogating party may wish to avoid delay and obtain more sophisticated responses by compelling the responding party to use his computer. The rules and their underlying policies provide some guidance when determining whether the interrogating party can obtain a motion to compel computer use.

An interrogating party might wish to compel the responding party to use his computer in several situations. For example, the responding party may have dual recordkeeping systems: an "active" file stored on the computer and a manually maintained "backup" file. Because a manual search of backup records takes more time than a machine-assisted search of computerized records, a responding party wishing to delay might impede discovery by using only the backup file to search for requested documents or to answer interrogatories.[34] An interrogating party confronted with such a situation might seek to speed the proceedings by asking the court to order the respondent to use his computerized files. The second situation arises when a respondent is willing to produce his computerized records but refuses to use the computer to analyze or consolidate the large quantities of information in the records. A requesting party might petition the court to order the respondent to perform such an analysis.[35] The respondent's greater familiarity with the data probably would make it easier for the respondent than for the interrogating party to perform the analysis. In the third situation, the respondent enjoys easy access to a computer but the particular records needed to answer interrogatories or to fulfill document requests have not been computerized. If the requesting party wishes to speed up the proceedings, he might ask the court to require respondent to enter his records into a computer. Although document entry involves a fairly substantial amount of time and labor, such processing will yield long-term benefits if discovery is expected to be extensive.

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[32] *See* FED. R. CIV. P. 26(c) (court empowered to enter any protective order that justice requires); notes 149-70 *infra* and accompanying text (full discussion of allocation among parties of costs of computer discovery); *cf.* American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 448 (W.D. Mo. 1976) (discovering party must pay half of respondent's costs of preparing requested transcript).

[33] The case law, which is replete with examples of egregious delay, demonstrates that the courts are fairly tolerant of delay. *See, e.g., In re* Folding Carton Antitrust Litigation, 83 F.R.D. 260, 263-64 (N.D. Ill. 1979) (court considered plaintiffs' untimely objections to interrogatories); Clark v. General Motors Corp., 20 Fed. R. Serv. 2d 679, 685 (D. Mass. 1975) (if interrogatories totally improper, court will not bar defendants from filing objections); Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302, 304 (S.D.N.Y. 1958) (plaintiff almost 2 1/2 years late in responding to interrogatories; court refused to dismiss case).

As yet there exist no cases involving the use or nonuse of computers to achieve delay. Discovery delay, however, clearly is a growing problem. Much of the current discussion about delay revolves around the imposition of proper rule 37 sanctions for dilatory conduct in discovery. For example, in *EEOC v. Carter Carburetor*, the district court fined the EEOC and prohibited it from using certain evidence because the agency had failed to comply with discovery requests. 76 F.R.D. 143, 145 (E.D. Mo. 1977), *rev'd*, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979). The Eighth Circuit criticized the EEOC for its conduct, but nevertheless directed the district court to withdraw its order because *both* parties had engaged in dilatory tactics. EEOC v. Carter Carburetor, 577 F.2d at 49. The Supreme Court, three justices dissenting, denied certiorari. 439 U.S. 1081 (1979). Dissenting from the denial, Justice Powell spoke strongly of the problem, stating "[t]he decision of the Court of Appeals in this case not only appears to be inconsistent with our recent decisions, but also could discourage efforts to curb the widespread abuse of discovery that is a prime cause of delay and expense in civil litigation." *Id.* at 1086 (Powell, J., with Stewart & Rehnquist, JJ., dissenting). For a comprehensive survey of the imposition of sanctions for discovery abuse by the circuit courts, see E. Epstein, C. Corcoran, F. Krieger & W. Carr, *An Up-Date on Rule 37 Sanctions After* National Hockey League v. Metropolitan Hockey Club, Inc., 84 F.R.D. 145 (1979).

[34] As yet, there are no cases involving computers that address this point. Nevertheless, in cases not

The rules do not explicitly provide for compelling a party to use a computer during discovery. Consequently, one must look to the general framework of the rules for guidance on both this issue and the related issue of equitable distribution of computer discovery costs among the parties. The relevant rules are rule 33, which governs the use of interrogatories,[36] rule 34, which governs requests for document production,[37] and rule 26(c), which permits the courts, when necessary, to allocate among the parties the costs of complying with discovery requests.[38]

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concerned with computers, courts have not allowed parties to claim burden in producing requested information when the burden stems from the respondent's own filing methods. *See* Alliance to End Repression v. Rochford, 75 F.R.D. 441, 447 (N.D. Ill. 1977) (defendants' motion to limit discovery on claim of burden denied; party cannot claim burden when burden results from failure to store material in organized file system); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976) (defendant not excused from compliance with discovery request when burden results from inefficiencies in defendant's massive recordkeeping system).

[35] Rule 33(c) provides some guidance in this situation; it requires the discovering party to undertake his own analysis or compilation if such a task would burden him no more than it would burden the respondent. *See* FED. R. CIV. P. 33(c) (when burden on discovering party "substantially similar" to burden on respondent, respondent need not perform compilation). On the other hand, if the discovering party's lack of familiarity with the information, or some other condition, would make it more difficult for him to compile the requested information, the respondent must undertake the compilation. *See* notes 52-57 & 60-64 *infra* and accompanying text (discussing requirements of rule 33(c) and applying rule to computer discovery).

[36] *See* FED. R. CIV. P. 33(a) (party receiving interrogatory must give answer or state grounds for objection).

[37] *See* FED. R. CIV. P. 34 (party may demand production of documents and things or entry upon land for inspection and other purposes). Unlike other rules, rule 34 expressly refers to production of computerized data. *See* note 67 *infra* (rule 34 phrase "data compilation" authorizes party to demand production of computerized information).

[38] Rule 26(c) orders may protect respondent from expensive or burdensome requests when respondent is unable to shift the burden of analyzing and compiling information to the discovering party under rule 33(c). *See* notes 52-57 & 60-64 *infra* and accompanying text (discussing rule 33(c)'s "substantially similar" test for shifting burden of analysis and compilation to discovering party). The Advisory Committee has recognized rule 26(c)'s role as an ultimate source of protection against burdensome interrogatories:

> [T]he respondent unable to invoke this subdivision does not on that account lose the protection available to him under Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the subdivi-

Although neither rule 33 nor rule 34 expressly deals with the question whether a court may compel a respondent to produce his computer files rather than his manual backup records, provisions in these rules, and policies concerning their construction, suggest that a court has the power to compel computer use. Both rules 33 and 34 allow a respondent thirty days to answer discovery requests,[39] and grant the judge discretion to allow a longer or shorter amount of time.[40] Judges often allow parties more than thirty days to respond,[41] but if computer use facilitates a timely response, the court should order respondent to use his computer and respond within thirty days. Rule 1, which requires courts to construe the rules to further just, speedy, and inexpensive litigation,[42] gives courts authority to prevent discovery delay.[43]

> sion, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

Advisory Committee Notes Accompanying 1970 Amendments to Rule 33, 48 F.R.D. 487, 525 (1970). Rule 26(c) also protects the respondent against overly burdensome requests for documents. *Id.* at 526-27.

[39] FED. R. CIV. P. 33(a), 34(b).

[40] Both rules state that "[t]he court may allow a shorter or longer time." *Id.*; *see* Founding Church of Scientology v. FBI, 27 Fed. R. Serv. 2d 601, 606 (D.D.C. 1979) (to avoid delay, court divided discovery into five phases and ordered party to answer phase I interrogatories within 20 days); EEOC v. New Enterprise Stone & Lime Co., 74 F.R.D. 628, 630, 632 (W.D. Pa. 1977) (because courts have discretion to specify time permitted for response to interrogatories, grant of extension of time permissible); *cf.* Depew v. Hanover Ins. Co., 76 F.R.D. 8, 9 (E.D. Tenn. 1976) (denial of motion to shorten time for request for admissions under rule 36 from 30 to 15 days). *See also* 8 C. WRIGHT & A. MILLER, *supra* note 30, § 2170 (court has authority to allow shorter or longer time for responses to interrogatories).

[41] *See* note 33 *supra* (instances when courts have allowed more than 30 days to respond to interrogatories).

[42] FED. R. CIV. P. 1. Rule 1 mandates that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." *Id.*

Courts occassionally rely on rule 1 to modify outcomes that specific rules seem to dictate, and to construe liberally the rules in the name of justice. *See* Sacks v. Reynolds Secs., Inc., 593 F.2d 1234, 1239 (D.C. Cir. 1978) (rule 12(b)(6) motion brought erroneously under rule 12(b)(1) treated as correctly formulated within dictates of rule 1; erroneous nomenclature no bar to recognizing true nature of action); *cf.* Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1376 (10th Cir.) (enforcement of harsh rule 37 sanctions justified if it will facilitate just, speedy, inexpensive litigation), *cert. denied*, 439 U.S. 833 (1978). Further, the courts have relied on all three requirements of rule 1. *See, e.g.*, Samuels v. Health & Hosps. Corp., 591 F.2d 195, 199 (2d Cir. 1979) ("just determination of action" provision of rule 1 favors retrial when confusion made full investigation impossible before commencement of trial); Hanover Ins. Co. v. Liberian Oceanway Corp., 398 F. Supp. 104, 110 (D.P.R. 1975) (although suit against Ports Authority possibly premature, including Authority in group of defendants will fulfill rule 1's mandate of just, speedy, and inexpensive determination of action); Edgar v. Fred Jones Lincoln-Mercury, Inc., 383 F. Supp. 583, 585 (W.D. Okla. 1974) (conscience prevents court from awarding punitive damages over $2500 for setting back car odometer, court entered judgment immediately, without jury verdict, to obtain prompt definitive ruling on permissible punitive damages from Court of Appeals), *rev'd on other grounds*, 524 F.2d 162 (10th Cir. 1975).

[43] *See* Herbert v. Lando, 441 U.S. 153, 177 (1979) (to further rule 1 mandate of just, speedy, and inexpensive litigation, courts must permit parties to discover only relevant evidence); EEOC v. Anchor Continental, Inc., 74 F.R.D. 523, 528 (D.S.C. 1977) (rule 1 requires government to respond immediately to interrogatories, despite work product claim, in order to save defendant time and expense); United States v. IBM, 68 F.R.D. 613, 617-18 (S.D.N.Y. 1975) (though not explicitly authorized by rules, plaintiff permitted to adjudicate enforceability of discovery order before serving defendant in order to further purpose of rules by expediting discovery in face of impending trial); *id.* (recognizing that rule 1 supports notion that one purpose of discovery is preventing delay at trial, court established procedures for depositions to expedite discovery); Firemen's Mut. Ins. Co. v. Erie-Lackawanna R.R., 35 F.R.D. 297, 298-99 (N.D. Ohio 1964) (to fulfill rule 1 objectives judge may require plaintiff to obtain information from nonparty in order to answer interrogatories).

When computers might help to further this policy courts should order parties to use their computers.

The issue of compelling a party to use his computer to facilitate discovery arose in *In re IBM Peripheral EDP Devices Antitrust Litigation.*[44] Plaintiffs petitioned the court to order IBM to use its computerized litigation system to speed the production of requested documents.[45] IBM argued that the litigation system was work product and that such an order would lead to the disclosure of privileged information.[46] The judge accepted IBM's argument and denied plaintiffs' request[47] because he failed to realize that the real issue in the case was *how soon* IBM would produce the documents.[48] Plaintiffs had no interest in discovering privileged information such as how IBM's system worked.[49] Plaintiffs only wanted IBM to use its computer so that it could obtain the requested documents—documents that plaintiffs clearly were entitled to see[50] —more quickly than if plaintiffs searched for them manually.[51] By focusing too much on the computer and too little on the rules of discovery, the judge reached the wrong decision, thus delaying the trial.

Rule 33(c) answers the question, posed by the second situation above, whether a judge may require respondent to perform computer analysis of business records instead of producing those records in answer to interrogatories. Under rule 33(c) respondent may avoid answering interrogatories by offering to supply the requesting party with business records that contain the requested information.[52] If respondent can show that the burden of deriving

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[44] 5 COMPUTER L. SERV. REP. 878 (N.D. Cal. 1975).

[45] Pretrial Hearing Transcript at 5, *In re* IBM Peripheral EDP Devices Antitrust Litigation, 5 COMPUTER L. SERV. REP. 878 (N.D. Cal. 1975).

[46] *Id.* at 58-61. Plaintiffs wanted IBM to use its system to produce all documents containing a certain word or phrase in order to obviate the need for a slow and expensive manual search for such documents. *Id.* at 32. IBM responded that production would disclose work product. *Id.* at 50-51. IBM claimed that the documents stored on the computer were those its attorneys had determined were most relevant to the case. *Id.* Therefore, if the court forced IBM to use its computer to satisfy plaintiff's request, plaintiffs would learn which of the many millions of arguably pertinent documents that IBM felt were important to its case. *Id.*

IBM's argument rested on unsound logic. Once plaintiffs requested a set of documents containing certain information, IBM was obliged to produce all those documents, with the exception of those that were privileged, regardless of whether they existed on or off the computer. IBM could have solved any work-product problems and satisfied plaintiffs' desire for swift production of the documents by providing documents meeting plaintiffs' specifications in addition to the documents that were stored on the computer.

[47] *Id.* at 71.

[48] *See id.* at 6, 25-26 (plaintiff asserts that issue not whether it may view documents but how soon).

[49] *Id.* at 23, at 35-36 ("we don't want their work product. We want them to use their work product, though . . . and to the extent that would facilitate their production of documents responsive to our requests, it should be used").

[50] *See id.* at 26, 31 (plaintiff seeks to obtain only meaningful nonprivileged documents). *See also* FED. R. CIV. P. 34 (party entitled to production of any document relevant and not privileged as long as described with reasonable particularity).

[51] Pretrial Hearing Transcript at 23-24, *In re* IBM Peripheral EDP Devices Antitrust Litigation, 5 COMPUTER L. SERV. REP. 878 (N.D. Cal. 1975).

[52] FED. R. CIV. P. 33(c). Rule 33(c) provides:

> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary

answers to interrogatories from his business records is "substantially similar" for both parties,[53] then he simply may provide the business records, thereby leaving the requesting party to compile his own answers.

When applied to computer-aided discovery, rule 33(c) suggests that the respondent need not perform computer analysis if it would be as easy for the discovering party to perform the analysis on his own computer. Conversely, if the discovering party does not have access to a computer, the "substantially similar" test of rule 33(c) implies that respondent must perform the analysis.

When applying the "substantially similar" test to determine whether the respondent must perform computer analysis, a court must make a number of inquiries concerning respondent's computer capabilities.[54] First, the court must determine whether the records, which respondent needs to perform the analysis, are stored on the computer. If the records do not exist on the computer, the court must determine whether computer processing is necessary and, if it is, what portion of the cost each party should bear.[55] Next, the court must decide whether respondent has programs that are capable of performing the analysis necessary to answer the interrogatories. If such programs do not exist, the court must determine the cost of writing them, and balance that cost against the burden to the interrogating party of divining answers from unanalyzed business records. If the burden upon the interrogating party is substantially similar to, or less than, the burden upon respondent, respondent need not perform data analysis.[56] In any event, the judge has the power to distribute costs "as justice requires."[57]

The third situation discussed above poses the question whether a court can compel a respondent to computerize his manual records in order to facilitate discovery. The rule 1 mandate of a speedy determination[58] and the rule 33 time limits on responses to interrogatories,[59] when read together, probably authorize courts to order respondent to computerize records.

If a court orders computerization the question then becomes whether the respondent alone must bear the costs of entering his manually-maintained records into the computer. Rule 33's "substantially similar burdens" test,

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> based thereon, and *the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served*, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Id. (emphasis added).

[53] *See* note 35 *supra* (explaining meaning and effect of phrase "substantially similar").

[54] Although this note argues that courts generally should be concerned more with the discovery issues than with the computer, when a court must evaluate a respondent's computer capabilities, some consideration of programming, and thus the functioning of the computer, will be required.

[55] *See* notes 58-64 *infra* and accompanying text (discussing when court should compel party to computerize records and how costs should be allocated).

[56] FED. R. CIV. P. 33(c).

[57] *See* FED. R. CIV. P. 26(c) (court may make any order which justice requires to protect party from undue burden or expense).

[58] *See* FED. R. CIV. P. 1 (rules should be construed to secure just, speedy, and inexpensive determination of every action).

[59] *See* FED. R. CIV. P. 33(b) (respondent must answer or object to interrogatories within 30 days).

discussed above, provides the answer to this question.[60] If the interrogating party wants respondent to computerize the records so that the interrogating party's own computer can analyze them, the "substantially similar" test requires the interrogating party to bear the costs; it would be as easy for the interrogating party to enter the records into his computer as it would be for the respondent.[61] If the interrogating party has no computer, however, he may hope that computerization of respondent's records will lead to greater efficiency in responding to future discovery requests. The importance of maintaining "substantially similar" burdens remains a controlling consideration, but the burdens are long term, stretching over the course of the litigation.

In such a situation the court should conduct a hearing to determine the estimated scope of future discovery, and then balance the long-term burdens and benefits.[62] In a complicated suit, early computerization is likely to further the rule 1 objectives of just, speedy, and inexpensive litigation.[63] Moreover, rule 26(c) and the Advisory Committee's comments on rules 33(c) and 34 indicate that courts have the power to allocate costs.[64] Thus, the court should not hesitate to require the interrogating party to share the respondent's costs.

In each of the above cases, a court should hear evidence in order to determine relative burdens.[65] Except when a court must inquire whether programs exist to perform data analysis, however, a judge should not focus on the computer but should examine the discovery sought and the burden of compliance. Additionally, judges should use their power under rule 26(c) to distribute costs when an equitable distribution will speed the litigation and minimize the burden upon respondents.

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[60] *See* notes 35, 44-47 *supra* and accompanying text (explaining "substantially similar" test and using it to determine when party must perform analysis rather than merely hand records over).

[61] It is inconceivable that the cost of performing the task of coding and keypunching could vary substantially between the parties. Because the burdens are the same for both parties, it is unlikely that a court would ever order a respondent in such a situation to computerize records. Nevertheless, if the records were difficult to interpret or understand, it would be easier for the respondent to computerize them and the court might so order.

Note that the rule speaks in terms of burdens, rather than costs. FED. R. CIV. P. 33(c). Although most of the "burden," such as labor to keypunch records, is quantifiable, some of it is not. For instance, the long-term benefits of computerization might indicate that the court should compel respondent to computerize with costs to be shared by both parties. If, however, respondent's business is small, computerization might disrupt his entire operation. As a result, respondent might fall behind in his work, losing customers and goodwill. Because these burdens are not easily quantifiable, a judge might decide that the better course would be to forego computerization.

[62] *See* note 65 *infra* and accompanying text (describing courts' use of hearings to aid rule 33(c) determinations).

[63] FED. R. CIV. P. 1.

[64] For the text of the Advisory Committee's comments concerning the use of rule 26(c) to distribute costs, see note 38 *supra*.

[65] Courts frequently conduct rule 33(c) hearings; thus, the technique does not require the use of procedures unfamiliar to the courts. *See, e.g.*, Al Barnett & Son, Inc. v. Outboard Marine Corp., 611 F.2d 32, 35 (3d Cir. 1979) (upholding trial judge's finding that respondent's burden less than interrogating party's because only respondent could read his handwritten books and understand own bookkeeping methods); Broadway Delivery Corp. v. United Parcel Serv., Inc., 27 Fed. R. Serv. 2d 622, 624-25 (S.D.N.Y. 1979) (although discovered material voluminous, plaintiffs bear burden of proving own case once defendants provide all relevant information); Webb v. Westinghouse Elec. Corp., 27 Fed. R. Serv. 2d 589, 593 (E.D. Pa. 1978) (because liberal time allowance granted prior to trial, plaintiffs must compile own data from information defendant provided; defendant need only give plaintiff information necessary to interpret data).

C. DISCOVERY: COMPELLING PRODUCTION OF DATA BASES AND SOFTWARE

A litigant often needs to discover information that the opponent stores on his or his attorney's computer. As a general rule, discovery requests for computerized information and documents are no different than discovery requests for material that is not computerized. This is especially true when the material to be discovered consists of individual documents or small quantities of information. Sometimes, however, a litigant may wish to discover an entire data base or the computer software responsible for producing the opponent's reports and figures. Because of the large quantity of information contained within a data base and the special nature of software, a court may be reluctant to permit discovery of such material.

When confronted with a request to discover software, data bases, or portions thereof, courts should not dwell on the mysteries of computers, but should remember that specific rules govern discovery requests.[66] Rule 34, which governs an initial request for production of data bases or software[67] or subsequent requests to supplement answers to interrogatories through production of data bases or software,[68] requires the information sought be properly discoverable under rule 26(b).[69] Rule 26(b)(1) states broadly that a party may discover "any matter, not privileged, which is relevant to the subject matter involved in the pending action."[70] The first limitation on discovery of data bases and software, therefore, is that the requested information be relevant,[71] and the second limitation is the possibility that some of the information sought may be privileged.[72] With the exception of the quasi-privilege it affords to work-product,[73] rule 26(b) does not define privileges but merely incorporates into the rules those privileges defined elsewhere in the substantive law.[74]

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[66] Notwithstanding the general rule set forth in the text, courts may need to deal with the technical aspects of computers. For example, a judge who understands data bases would be better able to fashion a discovery order for litigation systems that would minimize the possibility of disclosing work product. *See* notes 44-51 *supra* and accompanying text (judge's inability to understand functioning of litigation system led to incorrect decision in *IBM* case); notes 118-21 *infra* and accompanying text (discussing when and how discovery of litigation systems leads to disclosure of work product).

[67] FED. R. CIV. P. 34(a). Rule 34(a) provides:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, *and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useful form*), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

Id. Rule 34 is the only rule that explicitly recognizes the possibility of computer discovery. The rule's use of the phrase "data compilations" and its discussion of translation through detection devices indicates that the drafters anticipated the need to discover computer information. The Advisory Committee Notes demonstrate that the drafters intended rule 34 to apply to computer data: "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices." Advisory Committee Notes Accompanying 1970 Amendments to Rule 34, 48 F.R.D. 487, 527 (1970). Further, the Advisory Committee states that the requirement that data compilations be "translated, if necessary" refers specifically to computers: "In many instances, this means that respondent will have to supply a print-out of computer data." *Id.*

[68] *Cf.* Allmont v. United States, 177 F.2d 971, 978 (3d Cir. 1949) (rule 34 governs document

Because of the relevance and privilege limitations, the requesting party first must determine whether the material he seeks to discover consists of litigation or business records. Discovery requests involving litigation systems often will implicate issues of privilege, while those involving business record-systems primarily will implicate considerations of relevance. A discussion of each system in light of the privilege and relevance standards follows.

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production in response to rule 33 interrogatory because any other construction would render rule 34 meaningless), *cert. denied*, 339 U.S. 967 (1950); 8 C. WRIGHT & A. MILLER, *supra* note 30, § 2166 (although court should not invalidate document production request under rule 33, rule 34 only proper way to obtain documents). Although rule 34 governs document production, rule 26(e) specifies when supplementation of interrogatory responses by production of documents is appropriate. *See* note 81 *infra* (discussing duty to supplement under rule 26).

[69] FED. R. CIV. P. 34(a) (party may discover any tangible things that may be discovered under rule 26(b)). Rule 34 specifiies an additional requirement that the discovering party describe the requested materials with "reasonable particularity." FED. R. CIV. P. 34(b). The interpretation of the "reasonable particularity" requirement varies from jurisdiction to jurisdiction. Certain courts define "reasonable particularity" to require an interrogating party to describe what he seeks to discover in sufficient detail to enable the respondent to identify the requested information. *See In re* Folding Carton Antitrust Litigation, 76 F.R.D. 420, 424 (N.D. Ill. 1977) (requests that indicate specific categories and time period for documents sufficient to inform reasonable person about documents sought); Mallinckrodt Chemical Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 354 (S.D.N.Y. 1973) ("reasonable particularity" standard satisfied if reasonable person would know which documents called for) (citing 4A J. MOORE, FEDERAL PRACTICE ¶ 34.07, at 34-57 & n.18) (2d ed. & 1981 Supp.). Thus, a request that designated particular programs or data bases would be sufficiently detailed to satisfy these courts. A request for a data base that contains specified information, or software that runs a particular program, is sufficient to locate the data base or software in the computer. Some other courts, however, have viewed the "reasonable particularity" standard as a means of defeating overbroad discovery requests and "fishing expeditions." *See* Tinder v. McGowan, 15 Fed. R. Serv. 2d 1608, 1611 (W.D. Pa. 1970) (rule 34 requires description with "reasonable particularity" and does not allow "fishing expeditions" permitted under other rules); Flickinger v. Aetna Cas. & Sur. Co., 37 F.R.D. 533, 535 (W.D. Pa. 1965) (one purpose of rule 34 not to discover what exists but to obtain production of items that do exist; only rules 26 through 33 permit "fishing expeditions"). Because requests for data bases or software are general requests, courts adhering to this standard require the requesting party to demonstrate that his request is directed to a particular goal, and is not simply a "fishing" trip. Most jurisdictions, however, do not adhere to the narrow definition; thus, a "reasonable particularity" standard generally should not defeat a request to discover data bases or software.

[70] The relevance standard is very broad. Information is relevant even if it is not admissible as long as it "appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). *But see* note 77 *infra* (discussing proposals to limit scope of relevance standard).

[71] FED. R. CIV. P. 26(b)(1).

[72] *Id.*

[73] *See* FED. R. CIV. P. 26(b)(3) (court must protect against disclosure of attorney's mental impressions, conclusions, and opinions about litigation); E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 96, at 205 (2d ed. 1972) (Supreme Court created work product rule as qualified privilege for lawyer's trial preparation material).

[74] 8 C. WRIGHT & A. MILLER, *supra* note 30, § 2016, at 15 (same rules of privilege apply to discovery as apply at trial).

Business-Record Systems. A party may seek discovery of the respondent's data base and software for two general reasons. First, the discovering party may have his own computer and wish to obtain respondent's data base and software for independent analysis and review. In an antitrust suit, for example, one party may want to analyze several defendants' data bases in order to obtain evidence of price fixing. Second, a party may question or find inadequate the responses to interrogatories that respondent's computer prepared, and wish to use the data base and software to verify or supplement the responses. For example, a party may prefer to run respondent's sales figures through his own computerized accounting system in order to check their accuracy.

A party may discover respondent's data base only if he can prove that the entire data base is relevant to the subject matter of the suit.[75] Because one goal of the rules is to promote complete discovery,[76] the concept of relevance is necessarily broad. Thus, any evidence that is "reasonably calculated to lead to the discovery of admissible evidence" is relevant.[77] The Supreme Court has suggested, however, that a judge may prohibit discovery if the requesting party's aim is to gather information for use in proceedings other than the pending suit, or when a party's aim is to delay bringing a case to trial, or to embarrass or harass the person from whom discovery is sought.[78]

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[75] *See* notes 69-72 *supra* and accompanying text (discussing standard of relevance under rules 26 and 34).

[76] *See* 8 C. WRIGHT & A. MILLER, *supra* note 30, § 2001, at 15 (philosophy of discovery rules is that every party entitled to disclosure of all relevant information in possession of any person).

[77] FED. R. CIV. P. 26(b)(1); *see* Harris v. Nelson, 394 U.S. 286, 297 (1969) (discovery rules inapplicable to habeas corpus proceedings because broad-ranging inquiry they provide would render efficient and effective administration of habeas corpus impossible); United States v. American Tel. & Tel. Co., 461 F. Supp. 1314, 1341 (D.D.C. 1978) (in complex litigation, discovery must be something of "fishing expedition" to effectuate purpose of discovery rules); Pierson v. United States, 428 F. Supp. 384, 390 (D. Del. 1977) (discovery rules designed to provide access to fullest possible knowledge of issues and facts before trial).

Despite the vast body of case law supporting the proposition that the Federal Rules of Civil Procedure provide for broad discovery, relevance to the subject matter of the suit remains the test. *See* Pierson v. United States, 428 F. Supp. at 390 (relevance initial discovery question). Cases and proposals for amendments to rules, however, indicate that courts are retreating from a strict adherence to the concept of relevance.

For example, the Supreme Court recently indicated that relevance is not the only factor that a court should look to when deciding whether to permit discovery. In Herbert v. Lando, 441 U.S. 153, 177 (1979), the majority balanced the rule 26(b)(1) relevance standard against the rule 1 requirement to construe the rules to secure "just, *speedy*, and *inexpensive*" dispute resolution, *id.* at 177 (emphasis in original), and concluded that the district court should limit discovery when justice requires. *Id.*

In 1977, and again in 1980, an American Bar Association committee proposed an amendment to rule 26(b)(1) limiting discovery to only those materials relating to the "claim or defense" of any party, rather than to materials relating to the "subject matter" of the suit. SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE 2, 4a-5a (Revised Preliminary Draft, September 1980).

The recently adopted amendments to the Federal Rules did not include the ABA's proposed change. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323, 332 (1979) (although change in scope of discovery considered, abuse of discovery not so widespread as to require such a basic change). The matter, however, has not been laid to rest. In the Supreme Court's statement on amendments to the Federal Rules of Civil Procedure Justices Powell, Stewart, and Rehnquist dissented, convinced that unnecessary discovery goes unchecked in far too many cases. Dissenting Statements on Amendments to the Federal Rules of Civil Procedure, 100 S. Ct. No. 16, at 1-3 (1980).

If the ABA's proposed amendments are adopted in the future, it is important to recognize the consequences to computer discovery. Many of the items currently discoverable, such as various data bases, are only available because of the broad standard of relevance. Discovery of software, another marginal case, also rests on the broad concept of relevance. If the scope of discovery narrows, it is conceivable that these components of computer systems will no longer be discoverable.

In view of these considerations, whether a court can compel discovery of a data base depends upon the ability of the requesting party to prove relevance. If the entire data base is relevant,[79] a court will allow the party to obtain the data base even if the party seeks the information in order to subject it to independent analysis.[80] If the requesting party wants the data base for the purpose of supplementing interrogatory responses, however, the trial judge will approve the request only if the party's motive is not harassment.[81] As a matter of policy, unless the request clearly indicates an intent to harass the respondent, judges should allow requests for relevant material in order to make maximum use of whatever computer resources a discovering party possesses.

Although courts should apply discovery rules liberally to permit discovery of data bases, they should restrict discovery of software; information contained in software is rarely relevant to the subject matter of the law suit. Programs generally contain no information that concerns the central issues of the litigation, and thus programs will not be relevant unless the computer's performance is at issue.[82] If the requesting party wants the software for no reason other than to run programs on his own system, and cannot demonstrate relevance to a trial issue, the judge should deny the request.[83] If, however, the requesting party doubts the correctness or veracity of respondent's responses to interrogatories, and the process by which the respondent derived those answers, the software that produced the answers may become relevant.[84] In this case a request for software would constitute a request for supplementation of responses to interrogatories.[85] If the requesting party can establish a reason to doubt the respondent's answers, the requesting party will have met the test of relevance.

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[78] *See* Herbert v. Lando, 441 U.S. 153, 177 (1979); Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 352 n.17 (1978).

[79] The question of whether the entire data base is relevant will depend upon the nature both of the suit and of the stored data. For instance, if *X* Corporation sues *Y* Corporation for price-fixing in the electronic appliance market, and *Y* has a data base containing nothing but sales information on electrical appliances, *Y*'s entire data base is relevant. If *Y* also sells camping goods, however, and combined sales data are in the data base, the entire data base is not relevant. *Y*, however, is not precluded from segregating data in its data base.

[80] A data base is, in a sense, a single unit of information composed of interrelated sub-units. *See* note 8 *supra* and accompanying text (discussing data bases). The data base structure may cause problems for parties requesting discovery of data bases. Quite possibly, a court would deny a request to discover a data base, regardless of the relevency of the majority of the data in the data base, if some portion of the data were irrelevant. Such a ruling might effectively foreclose discovery of the relevant information, because it is often difficult and prohibitively expensive to segregate data contained in the data base.

Recognizing this possibility, drafters of future rules may wish to consider a "substantially all" test for data bases. The test would work as follows: if substantially all of the information in a data base is relevant, the data base is discoverable, even if discovery results in the disclosure of some irrelevant information. This test would be particularly appropriate when the cost of segregating the relevant and irrelevant portions of the data base is fairly high.

[81] Rule 26(e) governs supplementation of interrogatory responses. FED. R. CIV. P. 26(e). As a general rule, a party has no duty to supplement his responses. *Id.* A party must supplement responses, however, that deal with the identity of individuals who either will testify or who have knowledge that would lead to discoverable material. *Id.* at 26(e)(1). A party must also supplement answers to interrogatories when he discovers that a prior response was incorrect. *Id.* at (2). Finally, the court, at its own discretion, may order a party to supplement interrogatories. *Id.* at (3); *cf.* Rogers v. Tri-State Materials Corp., 51 F.R.D. 234, 245 (W.D. W. Va. 1970) (rule 26(e)(3) provides district court with latitude to require supplementation of interrogatories).

[82] For one case in which programming of the computer was at issue, and the trial judge nevertheless ordered an evidentiary hearing on the burdens of production before allowing discovery to proceed, see Dunn v. Midwestern Indem., 88 F.R.D. 191, 195, 197 (S.D. Ohio 1980) (plaintiffs seek to discover computer programs of defendant to determine if computer programmed with standards fostering racial discrimination).

Although relevance is the most significant obstacle to obtaining access to a business record system, relevant information occasionally may not be discoverable because of a trade secret[86] privilege.[87] If the respondent can prove that a trade secret privilege protects his software from disclosure, a court may deny a request for production of relevant software *despite* relevance.[88] Because the software that runs the computer performs a particular function,[89] and once revealed, is easily copied and distributed, respondent might be entitled to a protective order if he can show that disclosure of the software "will result in clearly defined, serious injury."[90] Such injury might include diminished revenue due to lost sales or loss of competitive advantage as other companies reap the benefits of the software without having borne the expense of development costs. Thus, unless the requesting party can guarantee that the software will remain secret, the court should not require the respondent to produce it.

If a discovering party seeks respondent's software for the purpose of verifying responses, however, the rule 34 provision for entry to make tests may enable him to surmount the trade secret privilege. Rule 34 allows a party to enter respondent's land to test, inspect, or sample any designated object.[91]

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[83] *See* FED. R. CIV. P. 26(b)(1) (discovery permitted only for material relevant to subject matter of the action). Software should be discoverable as long as familiarity with the software's operation would enable the discovering party to understand how the respondent produced his data. *See* United States v. Dioguardi, 428 F.2d 1033, 1038-39 (D.C. Cir.) (defendant in criminal action had right to discover computer programs used by Government to calculate figures used as evidence at trial), *cert. denied*, 400 U.S. 825 (1970); Dunn v. Midwestern Indem., 88 F.R.D. 191, 193, 195 (S.D. Ohio 1980) (discovery request for programs relevant when plaintiff seeks to show that defendant's computer programmed with standards fostering racial discrimination).

[84] *See* United States v. Dioguardi, 428 F.2d 1033, 1038-39 (2d Cir.) (court recognizes defendant has right to discover program in order to test validity of computer's results), *cert. denied*, 400 U.S. 825 (1970).

[85] For a discussion of the trial court's sole discretion in granting or denying requests for supplementation, see note 81 *supra* and accompanying text.

[86] A trade secret is any "formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competition who do not know or use it." RESTATEMENT OF TORTS § 757, comment b (1939).

[87] *See* United States v. IBM, 67 F.R.D. 40, 46-47 (S.D.N.Y. 1975) (court will issue rule 26(c) protective order if disclosure of commercial information will cause "clearly defined and very serious injury").

[88] *Cf. id.* at 47 (if information sought to be discovered meets criteria for trade secret, court may issue protective order to prevent disclosure). *See also* FED. R. CIV. P. 26(c) (judge may make any order justice requires, including order that discovery not be had, to protect interests of party).

[89] The respondent may have purchased the software, as part of a package, from a software distributor or computer manufacturer. Software packages are usually sold or leased pursuant to contracts prohibiting disclosure. D. BRANDON & S. SEGELSTEIN, DATA PROCESSING CONTRACTS 122-23 (1976).

[90] Monaco v. Miracle Adhesives Corp., 27 Fed. R. Serv. 2d 1401, 1402 (E.D. Pa. 1979) (no protective order issued when respondent failed to show that disclosure of allegedly confidential information would result in clearly defined and serious injury) (citing United States v. IBM, 67 F.R.D. 40 (S.D.N.Y. 1975)).

[91] Rule 34(a) permits testing of relevant tangible objects as well as entry upon another party's land to

If the discovering party has grounds to question the accuracy of respondent's computer or program, but cannot obtain the software because of trade secret problems, he could use rule 34 to test respondent's computer. The discovering party could perform the test by submitting previously analyzed data to the respondent, who would run them through the computer using the same program that provided the questioned response. The discovering party could then analyze the results to ascertain whether the expected results were achieved, thereby discovering whether the computer and the programs are accurate.

One criminal case, *United States v. Dioguardi*,[92] suggested testing as a way to avoid the need to discover software.[93] In *Dioguardi* the defendant was convicted of bankruptcy fraud partly on the basis of calculations produced by a specially prepared computer program.[94] On appeal, the United States Court of Appeals for the Second Circuit ruled that the defendant was entitled to discover the program.[95] Despite the Government's failure to produce the program, the Second Circuit upheld the conviction because the defendant never clearly manifested with sufficient clarity his desire to obtain the program.[96] Although *Dioguardi* is a criminal case the point it makes is applicable to civil litigation. A discovering party may run experimental data through respondent's computer to verify the correct functioning of a program, and thereby avoid conflict over production of software.[97]

Litigation Support Systems. A party seeking discovery of litigation systems[98] must meet the same relevance and privilege tests applicable to

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make tests. FED. R. CIV. P 34(a). For the full text of rule 34(a) see note 67 *supra*.

[92] 428 F.2d 1033 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970).

[93] *Id.* at 1037.

[94] *Id.*

[95] *See id.* at 1038 ("incomprehensible" that prosecutor should permit witness to testify as to computer results without having program available for defense scrutiny).

[96] *See id.* (argument that defense entitled to check computer calculations hidden beneath "avalanche" of other pointless arguments). In addition, the *Dioguardi* court noted that the defendant could have used a simple hand-held calculator to duplicate the computer's results. *Id.* at 1039.

[97] Testing may occur regardless of whether the respondent is willing to allow the test. On its face, rule 34 does not distinguish between requests for documents and requests to enter upon another's land for testing. FED. R. CIV. P. 34(a). Thus, it appears that relevance, the standard for document discovery, is also the standard for entry upon land. *See* notes 87-91 *supra* (discussing relevance standard under rules 26 and 34). Despite this, at least one court has held that the requesting party's entry onto private land imposes a greater burden on the respondent than document production would. Belcher v. Bassett Furniture Indus., Inc., 588 F.2d 904, 908 (4th Cir. 1978). If this is so, courts will not order entry upon land unless the degree to which the inspection aids the search for truth outweighs the burdens and dangers created by the inspection. *Id. See also* 8 C. WRIGHT & A. MILLER, *supra* note 30, § 2040 (order limiting discovery appropriate if burden on respondent outweighs advantage to discovering party).

[98] There are two types of litigation systems. A *full-text* system stores the entire text of all documents an attorney has entered into the system. *Computer Support Systems*, *supra* note 8, at 269. An *index-summary* system, on the other hand, contains only index fields containing information such as the title, author, date, and a brief abstract of the documents' contents. *Id.* at 270.

In addition, litigation systems generally employ one of the two major search methods. *Id.* at 269-71. *See also* LITIGATION SUPPORT SYSTEMS, *supra* note 3, §§ 4.46-4.51 (describing construction and use of data bases employing taxonomies and hierarchical search techiniques). With a *keyword* search, the search method employed by LEXIS and WESTLAW, the attorney specifies the words or phrases describing the subject that interests him. The computer then scans the data base and produces all documents containing business record systems.[99] Relevance, however, is rarely an issue in discovery of litigation systems. The very fact that the respondent established the system for the litigation indicates that most if not all of the material the system contains is relevant to the suit.[100] On the other hand, the heavy involvement of attorneys in the creation of the litigation system opens the door to work

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these words. Full-text systems generally employ keyword searches because there is a greater probability of finding keywords when the data base has the full text of documents rather than a summary, as with *index* systems.

A keyword search works in the following manner: suppose a shareholder sues *Y* Corporation for misrepresentation in a proxy concerning a recapitalization. One issue concerns views expressed by various board members at a board meeting on January 1, 1970. The law firm representing *Y* Corporation has a full-text data base, and an attorney would like to recover all documents relevant to this issue. Using a keyword search, the attorney might select combinations of keywords or phrases such as "board meeting," "recapitalization," "January 1, 1970," etc. The computer would then search the data base, providing the attorney with documents containing the requested combinations of keywords. For a general discussion of the use of full-text systems in litigation support, see Rubin, *The Application of Full-Text Retrieval to Litigation Support*, 11 FORUM 1136 (1976); Olsen & Goodrich, *Litigation Support Systems—Present Status and Future Use*, 11 FORUM 832, 845-49 (1976).

An index search differs from a keyword search because it involves the search of an index rather than the text of entire documents. The index contains a key consisting of fields that store information describing the document. Thus, a key might have one field describing the nature of the document (*e.g.*, L=letter, M=memorandum, D=deposition), a second for the document date (*e.g.*, 07/04/81), a third for the trial issue to which the document relates (*e.g.*, 1=misrepresentation, 2=negligence) and a fourth summarizing the document's contents. An attorney would enter a key of the types he wanted to find in each field, and the computer would search its index for fields of documents that match the request. If an attorney sought to find all memoranda dealing with misrepresentation written after July 1, 1981, he might enter M0701811 into the computer. The computer then would provide him with a list of all relevant documents. For an excellent discussion of index searches, see Olson & Goodrich, *Litigation Support—Present Status and Future Use*, 11 FORUM 832, 834-45 (1976).

Both methods have advantages and disadvantages. The index system requires the attorney or paralegal coding key fields to determine accurately the issue to which each document relates. The keyword system shares no similar risk because the full text of a document is stored, but an attorney must develop the ability to pick the correct keywords that will turn up the document he needs. *See generally id.* 839-52.

[99] *See* notes 69-74 *supra* and accompanying text (discussing relevance and privilege prerequisites to computer discovery).

A well-developed litigation system stores trial-related documents in an organized fashion enabling a party to obtain rapidly any information about the litigation. *See* LITIGATION SUPPORT SYSTEMS, *supra* note 3, § 4.09 (discussing various methods of storing documents for quick access). Consequently, a party should attempt to discover as much of respondent's litigation system as the rules allow. Initially, a discovering party should attempt to obtain use of respondent's entire system. Discovery of an entire litigation system would yield both the data base and software, enabling a discovering party to run the system on his own computer with no additional programming. If the court denies this request, a party next should attempt to discover the data base alone, thereby acquiring all computerized information relevant to the litigation. If the court deems the data base immune from discovery on privilege or relevance grounds, a party next should attempt to discover the entire index. By obtaining the index a party would learn something about all computerized documents in respondent's possession. Failing this, a party may undoubtedly obtain any individual document from respondent's system, provided that the document does not contain work product. It is irrelevant that an individual document is stored in the litigation system rather than in respondent's filing cabinet.

As technology advances, discovery of litigation system software probably will become increasingly insignificant. Every firm probably will use standardized software for every trial, with only the codes defining issues subject to change.

[100] For the sake of simplicity, this note assumes that all documents in the litigation system are relevant. This is a logical assumption, as a litigation system is a collection of documents needed to try a suit, that collection being, almost by definition, relevant.

product privilege claims.[101] Consequently, the discussion that follows concentrates on work product issues.

A discovering party must meet the requirements of rule 26(b)(3),[102] which protects attorney work product, in order to discover information and litigation systems that qualify as trial preparation material.[103] In order to obtain the protection of the rule a party must demonstrate that the material sought was prepared "in anticipation of litigation or for trial."[104] The rule then divides such trial preparation material into two classes. The rule accords "mental impression work product" absolute immunity from discovery.[105] A qualified privilege protects all other, "[non-]mental impression work product." A party may discover material protected by the qualified privilege if he makes showings sufficient to overcome his opponent's claim of privilege. Initially, the discovering party must demonstrate a "substantial need" for the information in the preparation of his case.[106] Then the discovering party must prove that he is unable to obtain the "substantial equivalent" of the data base without "undue hardship."[107] Throughout, the judge must consider the possibility that an order compelling discovery might provide one litigant with a "free-ride" on another's system.[108]

Judicial interpretations of the "substantial need" requirement indicate that most courts will deny requests for discovery of a litigation system.[109] Courts have ruled that a showing that the "material sought may be useful" does not satisfy the "substantial need" standard.[110] Furthermore, demonstrating that discovery of the litigation system will expedite proceedings, facilitate the production of proof, narrow the issues at trial, or reduce the quantity of evidence probably will not suffice.[111] Thus, even a request to discover the index to the litigation system, the least intrusive request,[112] probably is too broad to meet the "substantial need" standard.[113]

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[101] *See* note 73 *supra* and accompanying text (briefly discussing work product protection afforded by rule 26(b)(3)); note 102 *infra* (supplying pertinent portions of rule 26(b)(3)).

[102] Rule 26(b)(3) provides in part:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . *only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.* In ordering discovery of such materials when the required showing has been made, *the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning a litigation.*

FED. R. CIV. P. 26(b)(3) (emphasis added).

[103] *See id.*

[104] *Id.*

[105] *Id.* (court *shall* guard against disclosure of attorney's mental impressions, opinions and legal theories). Mental impression work product consists of material that contains information reflecting an attorney's assessment of his own case. *See* C. WRIGHT & A. MILLER, *supra* note 30, § 2026 at 230-31 (courts do not require disclosure of impressions of strong and weak points of case).

[106] FED. R. CIV. P. 26(b)(3); *see* notes 109-13 *infra* and accompanying text (discussing "substantial need" requirement for discovery of non-mental impression work product under rule 26(b)(3)).

[107] FED, R. CIV. P. 26(b)(3); *see* notes 114-16 *infra* (discussing "substantial equivalent without undue hardship" test for discovery of non-mental impression work product).

[108] *See* Advisory Committee Notes Accompanying 1970 Amendments to Rule 26, 48 F.R.D. 459, 501 (1970) (each side should prepare independently so that neither automatically benefits from adversary's preparation). The policy of encouraging independent trial preparation is at the heart of our adversary system. In Hickman v. Taylor, 329 U.S. 495 (1947), the source of today's rule 26(b)(3), Justice Jackson stated "a common law trial is and always should be an adversary proceeding. Discovery hardly was intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* at 516 (Jackson, J., with Frankfurter, J., concurring): *see* United States v. Chatham City Corp., 72 F.R.D. 640, 643 (S.D. Ga. 1976) (because each side encouraged to prepare independently, diligent litigant need not permit adversary to "feast where the fruits of his labors are freely served").

[109] Again, this is true only [illegible] requests to discover an entire system, a data base, or software. Requests

The second prerequisite to discovery of qualified immunity work product, the "substantial equivalent" standard, probably also will bar requests for discovery of litigation systems. This standard requires a party wishing to discover qualified immunity work product to demonstrate that he is unable to obtain the "substantial equivalent" of the information without undue hardship.[114] Courts have held that the costs and inconvenience of obtaining the substantial equivalent are insufficient to justify discovery of qualified immunity work product.[115] In addition, courts will not permit discovery of

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for individual documents stored in a litigation system may be allowed or denied as if the documents were not stored in the computer.

[110] *See* J.H. Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223, 234 (5th Cir.) ("mere surmise" that materials protected by qualified privilege would be useful to impeach witness insufficient to justify discovery), *cert. denied*, 414 U.S. 822 (1973); United States v. Chatham City Corp., 72 F.R.D. 640, 644 (S.D. Ga. 1976) (defendant's general need for materials does not justify "massive foray" into qualified work product; defendant can obtain substantial equivalent of information through depositions or interrogatories). The discovering party must make a threshold showing of necessity to satisfy the "substantial need" test. *See, e.g.*, United States v. O.K. Tire & Rubber Co., 71 F.R.D. 465, 467-68 (D. Idaho 1976) (because information defendant required available from public sources, showing of necessity insufficient to justify discovery of qualified privilege work product); Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 205 (N.D. Miss. 1972) (because discovering party already possesses means of obtaining information requested, showing of need insufficient to justify discovery of trial preparation materials); Hodgson v. General Motors Acceptance Corp., 54 F.R.D. 445, 446-47 (S.D. Fla. 1972) (because discovering party already possesses almost all information it seeks to discover, balancing of interests favors qualified work product privilege).

[111] *See* Brennan v. Engineered Prods., Inc., 506 F.2d 299, 303 (8th Cir. 1974) (vague assertions that requested information would expedite case, facilitate production of proof, narrow issues, and reduce evidence insufficent to demonstrate substantial need).

[112] Because the index request would yield only a list of the contents of respondent's data base, it represents a lesser intrusion than a request for the entire litigation system, which includes the index, the text of documents, and the software. The Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154 (1981), appears to recognize the greater intrusion afforded by production of the whole system, when it provides for discovery of "any digest, analysis, selection, compilation . . . and *any index or manner of access* thereto." *Id.* § 2(a)(3)(i). Though production in accordance with the Act does not constitute a waiver of any right or privilege assertable during discovery, *id.* § 2(b)(3), the Act implies that Congress recognized the value of discovering indices as a source of information.

[113] Courts have acknowledged that an overbroad discovery request will defeat a claim of necessity. *See* J.H. Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223, 231 (5th Cir.) (that file might contain valuable relevant evidence does not justify "wholesale fishing expedition" in derogation of privilege), *cert. denied*, 414 U.S. 822 (1973); United States v. Chatham City Corp., 72 F.R.D. 640, 643-44 (S.D. Ga. 1976) (claim of necessity to see investigative file no more than desire to learn extent of Government's case; "massive foray" disallowed); Fletcher v. Meserve, 20 Fed. R. Serv. 2d 202, 204-05 (D. Mass. 1975) (request for all correspondence in third party defendant's claims file far too broad, particularly when correspondence conceivably contains protected material).

[114] FED. R. CIV. P. 26(b)(3) (party seeking to discover another party's trial preparation materials must demonstrate inability to obtain "substantial equivalent" without "undue hardship").

[115] United States v. Chatham City Corp., 72 F.R.D. 640, 644 (S.D. Ga. 1976) (information found in investigative reports available by deposition or written interrogatories; cost or inconvenience of taking deposition not "undue hardship" justifying discovery of qualified immunity work product); Arney v. Geo. A. Hormel & Co., 53 F.R.D. 179, 181 (D. Minn. 1971) (information plaintiff seeks obtainable through taking of deposition; costs or inconvenience of deposition do not constitute "undue hardship").

materials representing attorney work product if the discovering party may obtain the information in another way.[116] Although a party might meet these burdens for a particular document contained in the respondent's system, in only the most unusual of cases will the requesting party be able to meet the burden for a significant part of the entire data base.

If a party surmounts the substantial need and undue hardship requirements, the court will permit discovery of qualified immunity work product stored in a litigation system.[117] The respondent, however, might attempt to forestall discovery of the complete litigation system by asserting that many of the documents in the system contain mental impression work product that need not be disclosed.[118] Because the discovery rules allow courts to permit discovery of such materials after the mental impression work product has been excised,[119] however, courts should permit discovery of all but the privileged portions of the litigation system. Respondent might further assert that the mere identity of documents selected for storage in a litigation system constitutes mental impression work product, because the selection of a document necessarily reveals that the respondent's attorney regards the document as integral to his trial strategy.[120] Nevertheless, this argument should not prevent discovery if the respondent enters documents into the system on a nonselective basis, for example by including all documents or by using a mechanical means of choosing which documents to enter.[121] In such situations document selection entails no element of an attorney's mental impressions.

Two commentators argue that, in addition to the discovery rules, courts should consider important policy concerns when evaluating a party's request to discover respondent's litigation system.[122] Sherman and Kinnard argue that the following factors should influence a court's decision to deny access to a respondent's litigation support system: the respondent's special expertise with the documents that enables the respondent to construct a better system, the time required to analyze the documents, the comparative costs of using respondent's system rather than an alternative system; and the possibility of obtaining an index to respondent's system elsewhere.[123] Sherman and Kinnard believe that these factors will enable the courts to strike a balance between the need for broad discovery[124] and the policy of preventing litigants from enjoying a "free-ride" on the work product of their adversaries.[125] The authors conclude by suggesting that cost and time considerations contribute to the "undue hardship" that results from depriving a party of access to respondent's litigation system.[126]

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[116] *See, e.g.*, United States v. Chatham City Corp., 72 F.R.D. 640, 644 (S.D. Ga. 1976) (because "substantial equivalent" of witnesses' statements obtainable through interview, deposition, or interrogatory, discovery of Government investigative files denied); Almaguer v. Chicago, Rock Island & Pac. R.R., 55 F.R.D. 147, 149-50 (D. Neb. 1972) (discovery of witness' statement denied because witness previously available and never deposed by discovering party); Tinder v. McGowan, 15 Fed. R. Serv. 2d 1608, 1610 (W.D. Pa. 1970) (when plaintiff already obtained information through depositions, desire to prove depositions false no justification for discovery of investigative reports and witness statements).

[117] *See* FED. R. CIV. P. 26(b)(3) (party may discover qualified immunity work product upon showing of substantial need and undue hardship).

[118] *See id.* (court shall protect against disclosure of attorney's mental impressions, conclusions, opinions, or legal theories).

[119] *See* Advisory Committee Notes Accompanying 1970 Amendments to Rule 26(b)(3), 48 F.R.D. 487, 502 (1970) (to protect mental impression work product court may find it necessary to order disclosure of document with portions deleted); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 736 (4th Cir. 1974) (court protected opinion work product from disclosure by permitting discovery of documents only after mental impressions excised), *cert. denied*, 420 U.S. 997 (1975); 8 C. WRIGHT & A. MILLER, *supra* note 30, § 2026 (to carry out rule 26(b)(3) court may order production of document with portions deleted).

[120] *See* Pretrial Hearing Transcript at 50-51, *In re* IBM Peripherial EDP Devices Litigation, 5 COMPUTER L. SERV. 878 (N.D. Cal. 1975) (assertion that production of documents from litigation system would disclose work product).

[121] *See Computer Support Systems*, *supra* note 8, at 287-90 (no violation of work product privilege when documents disclosed had been chosen for entry into litigation system on basis of mechanical criteria).

[122] *See id.* at 278-84 (discussion of factors courts should consider when evaluating requests to discover litigation systems).

Essentially, the Sherman-Kinnard argument is one of maximization of resources. It states that a respondent's familiarity with his own documents and special expertise in dealing with the documents' subject matter enables the respondent to prepare a litigation system more cheaply and more effectively than his adversary could.[127] Therefore, it suggests that the adversary should be able to gain access to respondent's litigation system.[128] When discussing the time and cost of creating a litigation system the authors argue that courts should apply a cost-benefit analysis to determine if system duplication by the discovering party would be so wasteful[129] as to meet the "substantial equivalent" test of rule 26(b)(3).[130] Finally, the authors note that although financial considerations alone generally are not grounds for permitting discovery, discovery might be proper if a party were so impoverished that the denial of access to another party's litigation system would render the "substantial equivalent" test meaningless.[131]

Though Sherman and Kinnard's suggestions have intuitive appeal, the policy of the federal rules requiring litigants to prepare their own case[132] militates against permitting broad discovery of litigation systems. The proposition on which Sherman and Kinnard base their advocacy of wide-ranging discovery—that litigants should begin trial on an even footing—is untenable. The difference between possessing and not possessing a litigation system is similar to the difference in resources possessed by a sole practitioner and a firm with 100 attorneys. Yet few commentators would argue that every litigant's attorney must have equal resources. Rule 26(b)(3) requires litigants to perform their own trial preparation, allowing discovery of qualified immunity work product only when there are no other means of obtaining essential information.[133] By allowing the discovery of litigation systems, the development of which requires the expenditure of significant amounts of time, effort, and money, the courts would undermine the policy behind rule 26(b)(3) and chill the development of such systems.[134]

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[123] *See id.* at 277-78 (suggesting that courts' failure to consider these factors in *IBM Peripheral EDP Devices Litigation* resulted in improper decision on "undue hardship" issue).

[124] *See id.* at 278-84 (discussing factors affecting party's ability to obtain "substantial equivalent" of information necessary to mount effective case).

[125] *Id.* at 295.

[126] *See id.* at 283-84 (only when court certain that party's financial condition renders him unable to pursue discovery should court, in deference to policy favoring adequate access to information, permit access to adversary's litigation system).

[127] *Id.* at 278-79.

[128] Sherman and Kinnard argue that due to the discovering party's lack of familiarity with respondent's documents and subject matter, his litigation system would be markedly inferior to respondent's. *Id.* at 278. Consequently, the discovering party's system would not contain the "substantial equivalent" of the information held by respondent. *Id.* Sherman and Kinnard suggest that the "substantial equivalent" standard of rule 26(b)(3) would allow the court to permit the discovering party to gain access to respondent's litigation system. *Id.*

[129] *Id.* at 281.

[130] *Id. See also* notes 114-16 *supra* and accompanying text (discussing "substantially equivalent" test). The authors support their argument by pointing to rule 1's mandate of "just, speedy and inexpensive" litigation. *Computer Support Systems*, *supra* note 8, at 281.

When they refer to the "substantially equivalent" test, the authors apparently mean the "undue hardship" clause of rule 26(b)(3). They argue, in effect, that to obtain the "substantial equivalent" of respondent's information, the discovering party should not have to endure the "undue hardship" of creating his own litigation system. Instead, the discovering party should be granted access to respondent's system.

[131] *Id.* at 282-84.

[132] *See* note 108 *supra* and accompanying text.

Further, Sherman and Kinnard's arguments apparently are based more upon market economics and an intuitive notion of justice than upon current interpretations of the rules.[135] If the Advisory Committee and Congress should determine that the goals enunciated by Sherman and Kinnard are reasonable and worthwhile, then they should amend the rules. Until that time, the current notions of the rules' functions will continue to bind the courts.

D. PRODUCTION IN A PARTICULAR MEDIUM

Once a court determines what computerized information is discoverable, it may have to determine whether to compel respondent to produce the information in an appropriate production medium.[136] A discovering party who has a computer and expects to receive voluminous quantities of information might prefer to receive the material in a computer-readable medium.[137] Alternatively, a discovering party that has no computer or that expects to receive only small quantities of information or information that requires only simple analysis might prefer to receive information in the form of computer print-outs or microfiche.[138] Selection of the means of production is an easy problem, the answer to which depends on the needs and capabilities of the parties. The more difficult and important question, and one that the court rather than the parties must decide, is whether respondent should be compelled to produce information in the form specified by the discovering party.

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[133] *See* notes 110-16 *supra* and accompanying text (discussing "substantial equivalent" and "undue hardship" tests as prerequisites to discovery of qualified immunity work product).

[134] Sherman and Kinnard themselves acknowledge this fact. *See Computer Support Systems, supra* note 8, at 281 (unless party afforded work product protection for support system, incentive to create it will disappear, leading to slower and more protracted litigation).

[135] *See id.* at 280 n.57, 281 n.60 (setting forth some economic arguments supporting discovery of litigation systems).

[136] This determination involves two sparate questions: whether there *is* an appropriate production medium and whether respondent should be *compelled* to provide the information in such a medium.

[137] Magnetic tape and disk are the best computer-readable media because they store large quantities of information in a form that provides for quick and easy access. Paper tape and punch card also are computer-readable media; however, they are more difficult to use, especially when large quantities of information are involved. The advent of optical character readers (OCR), which can read certain types of typed documents directly into the computer, suggests an ordinary document may be a computer-readable medium.

[138] Microfiche permits the storage of large quantities of information in a small amount of space. Thus, microfiche may be the appropriate production medium when large quantities of documents are involved. To read microfiche, an attorney needs a microfiche reader. These machines are relatively inexpensive and sufficiently compact to be kept in the attorney's office.

Rule 34, governing production of documents,[139] suggests that a discovering party should receive discovery in whatever form he desires. Rule 34 provides for discovery of documents and things, "including . . . data compilations . . . translated, if necessary, by the respondent through detection devices into reasonably usable form."[140] The Advisory Committee Notes state that the definition of "documents" is meant to reflect changing technology.[141] The Committee observed that in some instances the rule requires respondent to supply computerized information in the form of a print-out.[142] Although the Advisory Committee mentions only print-outs, its statement may be interpreted as an example of, rather a limitation upon discovery media. This interpretation seems particularly persuasive if the rules are viewed as facilitating efficient litigation.[143]

Several courts that have considered the production medium issue have concluded that a discovering party may specify the form in which he wishes to receive the requested material.[144] In *Adams v. Dan River Mills, Inc.*,[145] for example, the United States District Court for the Western District of Virginia compelled production of computer cards and tapes, over defendant's objection that plaintiff had already received print-out information.[146] The court, recognizing that production of information in a computer-readable form would be less expensive and more accurate than production in traditional media, interpreted rule 34 broadly to compel the production of computer cards and tapes.[147]

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[139] Fed. R. Civ. P. 34.

[140] Fed. R. Civ. P. 34(a).

[141] Advisory Committee Notes Accompanying 1970 Amendments to Rule 34, 48 F.R.D. 487, 527 (1970). The Committee goes on to say that the rule's inclusive description of "documents" makes it clear that:

> Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices respondent may be required to use his devices to translate the data into usable form.

Id.

[142] *See id.* (respondent may be required to translate data into usable form). Nevertheless, the Committee recognized the possibility that requiring production in a particular medium might burden the respondent. *Id.* The Committee stated that the court can protect the respondent by issuing a rule 26(c) order that requires the discovering party to pay costs. *Id.*

[143] Rule 1 directs that the rules should be construed to secure the just, speedy, and inexpensive determination of every action. Fed. R. Civ. P. 1.

[144] *See In re* Japanese Elec. Prods. Antitrust Litigation, 494 F. Supp. 1257, 1258, 1262 (E.D. Pa. 1980) (respondent must produce computer tape so that requesting party's computer can effectively analyze data); Adams v. Dan River Mills, Inc., 54 F.R.D. 220, 221 (W.D. Va. 1972) (respondent must produce computerized tape and card master file of W-2 forms so that discovering party can prepare accurate and up-to-date statistics); *cf.* United States v. Davey, 543 F.2d 996, 999 (2d Cir. 1970) (statute permitting IR to compel production of "books, papers, records" includes computer tapes; test is whether record sheds light on issues, not record's form).

[145] 54 F.R.D. 220 (W.D. Va. 1972).

[146] *Id.* at 221-22.

[147] *See id.* (Advisory Committee Notes suggest that rule 34 authorizes courts to order production of computer cards or tapes). Although the Advisory Committee mentioned only "print-out," the court decided that Rule 34 was equally applicable to tapes and cards. *Id.*

Although precedent and a common-sense interpretation of the rules provide a ready solution to computer production questions, courts still encounter difficulties when addressing such issues.[148] The cause of the problem may stem from the resistance of litigants whose interests are served by opposing computer discovery motions. In order to further the policy goals of rule 1, courts should concentrate on the discovery issues and avoid becoming entangled in technical computer issues. By doing so, the courts will be able to make expeditious decisions permitting, when appropriate, the production of computerized information in whatever medium is proper.

E. ALLOCATING DISCOVERY COSTS

Equitable distribution among the parties of the costs of computer discovery is essential to the efficient utilization of computer resources. Computer discovery necessarily involves costs different from those involved in the discovery of manually-maintained information. This note has discussed many situations involving special costs: the costs of duplicating data for preservation,[149] computerizing business records for future discovery use,[150] and producing discovery materials in a particular medium.[151] Although computer use gives rise to costs that would not have been incurred with other discovery methods, these costs usually are not excessive, especially when compared with the benefits that attend computer use.

In *Oppenheimer Fund, Inc. v. Sanders*[152] a unanimous Supreme Court, in perceptive dicta, noted that computers generally are not cost-increasing devices.[153] In the course of its opinion, the Court criticized the Second Circuit's belief that petitioner's use of computer records increased the costs of discovery.[154] "Indeed," stated the Court, "one might expect the reverse to be true, for otherwise computers would not have gained such widespread use in the storing and handling of information."[155] The *Oppenheimer* Court's statements are significant because they recognize the important fact that computers need not increase costs.[156]

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[148] *See In re* Japanese Elec. Prods. Antitrust Litigation, 494 F. Supp. 1257, 1259 (E.D. Pa. 1980) (acknowledging misunderstanding of computer discovery issue, court overturns previous decision denying discovery).

[149] *See* notes 20-32 *supra* and accompanying text (discussing duplication as method of protecting data from intentional or inadvertant destruction).

[150] *See* notes 33-65 *supra* and accompanying text (discussing considerations relevant to whether court should compel party to computerize records).

[151] *See* notes 137-48 *supra* and accompanying text (discussing considerations that should guide courts deciding whether to compel production of computerized data in particular medium).

[152] 437 U.S. 340 (1978).

[153] *See id.* at 362 (dictum) (retrieval of information stored on computers no more expensive than extracting information from records stored in less modern forms). The plaintiffs in *Sanders* brought a class action alleging violations of the federal securities law, *id.* at 342-43, and sought an order requiring defendants to help compile a list of the names and addresses of class members from records maintained by the transfer agent of the Oppenheimer Fund. *Id.* at 342. The plaintiffs wanted the list in order to comply with the notice requirements of rule 23(c)(2). *Id.*

[154] *Id.*

[155] *Id.* The Court added that the Second Circuit's suggestion that defendants should have used a "different system" to maintain their records "border[ed] on the frivolous." *Id.* at 362-63. The Supreme Court also noted that the court of appeals had not suggested what "different system" was to be used to decrease costs. *Id.* at 363.

[156] *See also* LITIGATION SUPPORT SYSTEMS, *supra* note 3, §§ 4.4 -4.43 (discussing costs that attorneys

Courts should recognize that computers pose new and different costs, and should concentrate on identifying the parties who should properly bear these costs. For example, a respondent who possesses a computer system will encounter higher-than-normal costs if, in order to comply with a discovery order, he must computerize materials that he would otherwise store manually.[157] Although courts properly may require a respondent to use his computer,[158] they should require that the discovering party, who obtains a substantial benefit from respondent's computer, bear the costs of creating a program suited to meeting the discovering party's needs.[159]

Although the respondent generally pays the costs of discovery,[160] the federal rules do provide safeguards to protect against undue hardships.[161] Individual rules also specify when the burdens of discovery, including labor costs,[162] should be shifted to, or shared with, the requesting party. For example, rule 33 requires the respondent to bear the burden of responding to interrogatories,[163] but grants him the option of producing business records when the burden of ascertaining answers from the records is substantially similar for both parties.[164] If a discovering party requests computer documents, rule 34 again requires the respondent to bear the costs.[165] In this instance, however, the court has the power under rule 26(c) to relieve any excessive burden imposed by production of computer materials.[166]

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consider in developing litigation support systems); Olson & Goodrich, *Computer Support Systems*, *supra* note 8, at 852 (cost of computerized data base not greatly in excess of manual system, especially when frequent searches for information required).

[157] *See* notes 58-64 *supra* and accompanying text (suggesting that party can compel respondent to computerize records to further rule 1 interests in speedy litigation).

[158] *See* notes 36-64 *supra* and accompanying text (discussing use of Federal Rules of Civil Procedure to compel party to use his computer).

[159] The Supreme Court explained in *Sanders* that a respondent is not guilty of bad faith merely because his computerized information is not stored in the manner most useful to the discovering party. 437 U.S. at 363. Thus, the respondent should not have to bear the costs of programming the computer to extract this information for the discovering party. *See id.*

[160] Rule 26(c) and the Advisory Committee Notes suggest that respondent usually must bear the expenses of discovery. *See* FED. R. CIV. P. 26(c) (protective order protects party from undue burden or expense resulting from compliance with discovery request); Advisory Committee Notes Accompanying 1970 Amendments to Rule 33, 48 F.R.D. 487, 525 (1970) (in appropriate case court may require discovering party to reimburse respondent). *See also* C. WRIGHT & A. MILLER, *supra* note 30, § 2038 (although not required, court may order discovering party to pay expenses).

[161] *See* FED. R. CIV. P. 26(c) (court may issue order to protect party from oppression and undue burden or expense); note 30 *supra* (discussing extent of court's power under rule 26(c)).

[162] To some extent, burden is equivalent to cost. Burdens, however, are not always easily quantified. For instance, if the court compels respondent to devote his computer to discovery, the respondent may be unable to use the computer for business purposes. As a result, he may fall behind in his work, make a late delivery, and lose a customer and commensurate goodwill. In such a case, instead of quantifying the "cost" to respondent, a court might choose not to force respondent to use his computer.

[163] *See* Advisory Committee Notes Accompanying 1970 Amendments to Rule 33, 48 F.R.D. 487, 525 (1970) (rule 26(c) protective order and rule 33(c) shift burden to interrogating party and thus imply that respondent usually bears burden).

[164] *See id.* at 524 (rule 33(c) shifts burden to interrogating party by forcing such party to research answers to interrogatories once records made available by respondent).

[165] *See* note 160 *supra* and accompanying text (Advisory Committee Notes and rule 26(c) imply that respondent must bear expenses of discovery).

[166] FED. R. CIV. P. 26(c); *see* Advisory Committee Notes Accompanying 1970 Amendments to Rule 34, 48 F.R.D. 487, 527 (1970) (courts have ample power under rule 26(c) to protect respondent from undue burden or expense by restricting discovery or requiring discovering party to pay costs).

The framework for cost distribution provided by the rules should facilitate the maximum use of computers while simultaneously protecting parties from undue hardship. For example, if the respondent has existing programs that are capable of answering a discovery request, the cost to respondent probably will be less than if the respondent had to cull through records by hand. Thus, the respondent properly should bear discovery costs.[167] If the programs do not exist, however, and respondent can produce business records without additional programming, he can exercise the rule 33(c) option to produce business records.[168] If the respondent's burden increases because of the need to create a program to facilitate the production of business records, rule 26(c) will allow the courts to prevent undue hardship.[169]

Courts distribute costs in order to equalize the relative burdens on the parties. Unfortunately, it is difficult for a judge unfamiliar with computer technology to determine what burdens each party bears. If a judge is unsure about the allocation of burdens, he should conduct an evidentiary hearing and hear expert testimony on the subject.[170] Experts, such as programmers and computer analysts, can describe the process involved in meeting a discovery request. Both sides may introduce testimony, and the court can question the experts on points of disagreement. After such a hearing a judge will be better able to determine which side should bear discovery costs.

CONCLUSION

Computers have great potential for improving the speed and accuracy of the discovery process. The increasing use of computers by attorneys will force the courts to answer challenging questions about the application of the Federal Rules of Civil Procedure to computerized discovery. Because the rules rarely address computer issues directly, the courts must take care to determine exactly how the rules apply in the context of the computer discovery process.

When applying the rules to computer discovery courts should focus on the discovery issues and avoid confusing inquiries about how computers function. Except in rare cases, the primary concern is not what the computer does, but what information a litigant seeks to discover, or what task a litigant seeks to compel respondent to perform. With the inquiry thus focused, any questions concerning the computer's performance become irrelevant.

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[167] Rule 33 requires the respondent to bear costs. *See* note 160 *supra* and accompanying text (demonstrating that Advisory Committee Notes to rule 33 imply that respondent usually bears costs).

[168] *See* FED. R. CIV. P. 33(c) (respondent may produce business records rather than answer interrogatories if burden of formulating answer substantially same for respondent and discovering party); notes 52-57 *supra* and accompanying text (discussing use of rule 33(c) "substantially similar" test when deciding whether respondent must perform computer analysis of his records).

[169] *See* FED. R. CIV. P. 26(c) (court may make any order that justice requires to protect party from undue burden or expense).

[170] At least one court has recognized the value of holding evidentiary hearings with expert testimony to resolve computer issues. In Dunn v. Midwestern Indem., 88 F.R.D. 191 (S.D. Ohio 1980), the plaintiffs sought to discover defendant's computer capabilities to determine whether the defendant's computer was programmed in a way that fostered racial discrimination. *Id.* at 193. Faced with the defendant's contention that compliance with plaintiff's request would be unduly burdensome, the court ordered a hearing to determine whether compliance would be "merely time consuming and laborious, or . . . impossible." *Id.* at 197.

Finally, courts should not hesitate to use their broad powers to compel discovery and to distribute costs equitably. The value of computers lies in maximization of their vast potential. If utilization of one party's computer benefits another party, the benefited party may properly bear the costs of computer use.

Barry Evan Friedman

Outside the Courts

By Earl Johnson, Jr., Valerie Kantor, and Elizabeth Schwartz

Commissioned by the National Center because of the growing interest in dispute resolution by methods outside the formal judicial system, Outside the Courts: A Survey of Alternatives to Civil Litigation *describes important alternatives to the dispute resolution tasks presently assigned almost exclusively to the courts. This excerpt from the recently released publication presents important considerations for this method of judicial reform.*

During most of America's history its citizens have turned to the courts for resolution of civil disputes that cannot be settled voluntarily. Each year millions of new cases are filed[1] and scores of new judges are hired to help decide these cases.[2]

In recent decades, however, there has developed a rapidly accelerating trend to remove many controversies from the formal judicial system and to simplify some of those that remain. This tendency can be detected in many unconnected initiatives. Pennsylvania and New York have inaugurated compulsory arbitration for all claims up to a few thousand dollars. Several states have enacted no-fault automobile compensation, making litigation unnecessary in most car accidents. Other jurisdictions have instituted settlement procedures for modest estates which bypass the formalities of probate court.

Because these measures spring from a hodgepodge of motives and utilize completely different approaches, it is difficult to characterize them as a unified movement. Still, the general drift cannot be denied. This report examines the trend and its potential applications.

A PRELIMINARY DEFINITION

Judicial reform has long preoccupied judges and lawyers concerned about the quality and speed of justice dispensed in the courts. Prescriptions have ranged from improved methods of selecting judges to computerized recordkeeping in the clerk's office. The full panoply of remedies cannot be catalogued here. Rather, this report concentrates on the diversion of certain disputes and issues entirely out of the courts. It is confined to the diversion of civil controversies and issues in civil cases to the exclusion of criminal prosecutions.

The traditional notion of diversion, if a concept so young can aspire to possess tradition, connotes a transfer of disputes from the regular courts to some alternative forum: an administrative tribunal, an arbitrator, a meditation panel. This report proposes a broader definition which embraces both the *removal* of entire disputes or certain important issues implicated in such disputes as well as the *transplantation* of such disputes from more formal to less formal forums. Consistent with this definition are measures such as no-fault automobile compensation, which entirely eliminates the necessity of deciding certain controversies that otherwise must be resolved in the courts, and no-fault divorce, which effectively eliminates the need to decide time-consuming issues (such as cruelty, adultery, or other misconduct of a spouse) even though the dispute itself and any remaining issues are adjudicated in the courts. But before we attempt to present a comprehensive and systematic scheme of diversion alternatives, it is useful to consider the purposes served by diversion.

THE GOALS OF DIVERSION

Three distinct motives exist for diverting civil controversies and issues away from the regular courts. The first is to avoid delay and thereby speed resolution of disputes, the second is to reduce cost and thereby encourage access to a broader range of disputes, and the third is to increase expertise and thereby make possible more precise decisions in certain disputes.

The underlying goals of diversion are seldom articulated and frequently confused.

Unfortunately, the underlying goals of diversion are seldom articulated and frequently confused. It is not uncommon to find a reform is designed to serve one purpose but judged on how well it serves another.

Because of the crucial nexus between goal and design, purpose and evaluation, it

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is worthwhile to explore these three motives for diverting cases from the regular courts. During the course of this discussion we examine diversion in context with other means of accomplishing each goal.

Speedy Justice:
The Reduction of Backlog and Delay

Most agitation for removing disputes from the regular courts arises out of dissatisfaction over the caseloads which overwhelm the nation's judiciaries. The alarming statistical evidence of backlog and delay cannot be denied. In many jurisdictions a typical civil case may require four years to come to trial;[3] the national average is twenty-one months.[4] As a consequence, many injured persons abandon their claims entirely or accept inadequate settlements. Even those able to wait out the delay may lose respect for the judicial system.

The high cost of litigation irritates many and constitutes a total bar for some.

Diversion to nonjudicial forums is one possible remedy for court overload, backlog and delay. Another obvious solution is to increase the number of judges and enlarge the investment in the regular judicial system.[5] With more courtrooms available to adjudicate the same quantity of disputes, the caseload of each judge would fall. Theoretically, a sufficient increase in judicial resources would reduce individual caseloads, eliminate backlogs and enable decision of cases as quickly as the parties are ready. However, calculating the number of new judges required to reach that nirvana is no simple matter, and neither is persuading legislatures to enact such dramatic increases in judicial appropriations. Predicting the scale of the necessary investment is complicated by the rising trend of court filings, and there is no way to forecast the size of the inchoate caseload—the thousands or millions of claims that presently remain unfiled because justice appears so low that it is not only denied but ignored. Thus, abolition of backlog and delay probably would induce a sharp upturn in new cases, asserted by people who for the first time saw the courts as an effective recourse. Presumably the trend could continue until a new equilibrium between delay and demand was reached.

This scenario suggests that increasing investments in the regular courts, no matter how imposing, can never totally eliminate delay. Nevertheless, so long as speedier justice remains the sole purpose of reform, more judges and more courtrooms will mitigate the problem greatly.

A second and nearly opposite policy option is to attack delay by reducing caseload demand rather than by enlarging the supply of judicial resources. In the extreme, a government might declare a moratorium on new filings or erect new permanent barriers, financial or otherwise, to discourage people with grievances from seeking relief in the courts.[6] In practice these crude forms seldom are invoked. Still, many judges are extremely sensitive to the caseload factor and resist any diminishment of existing barriers to litigation, such as court costs and lawyer fees.[7]

Diversion, as traditionally conceived, is a policy alternative about halfway between increasing judicial resources and reducing caseload demand. It channels some of the demand currently placed on courts into other forums. However—and this consideration is frequently ignored—the alternative tribunal seldom is cost-free. Diversion usually entails an increase in the nation's investment in dispute resolution as well as a decrease in judicial caseloads. Moreover, unless the chosen nonjudicial forum is less expensive than the courts, society will not experience a net economic gain, and diversion can become the equivalent of hiring new judges and erecting more courthouses.

Increasing investments in the regular courts may never totally eliminate delay.

The other forms of diversion, which encompass reforms that eliminate entirely certain issues and disputes currently occupying the courts, are virtually costless. To the extent these reforms succeed there is a net reduction in the court's caseload, backlog and delay without offsetting expenses incurred by alternative tribunals.

Accessible Justice:
The Reduction of Litigation Cost

Litigation in the regular courts is expensive for both taxpayers and litigants. The government must pay judges and other court personnel and erect and maintain courthouses. Yet the costs borne by plaintiffs and defendants typically exceed the public's burden. Legal fees probably account for most of the litigants' tab. But there are other sizable items: payments to stenographers for transcripts of depositions and trial proceedings, fees to be paid jurors for their services, even certain charges that courts impose on litigants to defray the judiciary's expenses.

The high cost of litigation through the courts irritates many litigants, but for some it constitutes a total bar to the judicial process. No matter how meritorious the claim or how worthy the defense, a low income person (as well as many in the middle classes) is unable to afford to litigate most cases. Even the affluent will find the courts uneconomic unless the amounts in dispute exceed their investments in legal fees and other court expenses by a substantial margin.[8] Otherwise, they can win in the courtroom yet lose in the pocketbook.

As might be anticipated, pressures for diversion tend to intensify in two circumstances: when one of the parties lacks the means to afford the expense of court litigation and when the amount in dispute is insufficient to justify any litigant bearing that expense. In either case, disputants find the courts inaccessible. Unless some corrective action is taken the dispute will go unresolved or be decided without the participation of one of the litigants.

At the outset it should be observed that measures which speed justice do not necessarily make it less expensive or more available. Thus even though a larger investment in the judiciary—more judges and courtrooms—can be expected to reduce delay, this in no way trims the cost of deciding each individual dispute in the courts either for the government or the litigants. The system remains inaccessible to a significant segment of the populace and in major categories of disputes. The policy option of erecting barriers to discourage the filings of new cases is the antithesis of greater accessibility. It "solves" the problem of delay by simply closing the courthouse door to still more people and more grievances.

Three fundamental approaches may eliminate expense as an obstacle to prospective litigants. One is diversion of disputes to lower cost forums. Another is procedural reform to reduce the cost of adjudicating cases in the regular courts. The third is government subsidy of litigants unable to bear the full burden of the formal judicial process—rather than affording litigants a less costly means of asserting their rights, government merely absorbs the expense of those unable to pay their own way in the regular courts, and cost is no longer a barrier for the assisted parties.

Subsidy is the practical effect of legal aid and *in forma pauperis*, remedies that go back to the middle ages.[9] Of course, the United States is a long way from implementing this option in any comprehensive sense. Eighty or 90 percent of low income litigants are still left to fend for themselves.[10] In addition, the underlying principle would have to be extended far beyond these present manifestations if it were to respond to the dilemma of the well-to-do person implicated in a dispute over a sum insufficient to warrant recourse to costly forums like the courts. Government subsidies would have to be available irrespective of means to any party desiring to prosecute or defend most claims. It is doubtful that many legislatures would choose this course of action over the alternative of somehow curtailing the cost of litigating such matters.

Diversion to low-cost forums and simplification of judicial procedures, on the other hand, share a common theme: they seek to make justice more accessible by making it less expensive. Indeed, in theory it should be feasible to modify the courts enough to become as inexpensive as almost any imaginable alternative forum. The methods of ameliorating costs are the same: eliminate advocates (and the need for advocates), or at least substitute a lower cost version for the highly educated, high priced lawyers who presently enjoy a monopoly in less significant matters as well as the grandest cause; simplify the presentation of facts and the ascertainment of the law; possibly place more reliance on the weighting of equities than on the location of obscure precedents.

The list is developed in more detail in the report.[11] At this point it is sufficient to observe a natural reluctance to drastically alter the machinery of the regular courts. Thus, much of what is theoretically possible for the courts apparently is more easily implemented in a forum bearing a less traditional and imposing name.

Expert Justice: The Enhancement of Knowledge and Precision

Some disputes submitted to the courts are extraordinarily complex and technical. Merely comprehending the issues may require detailed knowledge of highly specialized fields: chemistry, nuclear physics, the economics of energy production. Judges, although learned in the law and experienced in problem solving, seldom possess the necessary technical background. As a result, there is a tendency to divert such controversies to nonjudicial tribunals composed of experts in the subject matter involved.

Examples of diversion prompted by technical complexity are legion. Not infrequently litigants voluntarily submit individual cases to arbitration panels made up of leading scientists, economists, or other relevant experts. Permanent boards have been formed to hear maritime cases, disputes over stock exchange transactions, international borders, navigation, and air traffic rights.

There is a salient difference between this use of diversion and the earlier purposes. Ordinarily it matters little whether the expert tribunals are more expensive than the courts. The aim is greater precision in the decision-making process. If that comes only at a premium, what is at stake usually justifies the investment. In contrast, diversion seldom makes sense as a means of expediting justice or rendering it

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Outside the Courts *cont'd*

more accessible unless the cost of resolving controversies is reduced. Although greater precision is a significant function of diversion in limited categories of cases, it is not as pervasive or critical as the goals of accessible and speedy justice. Consequently, it is not featured in this report.

PRINCIPAL FORUMS OF DIVERSION

The several goals of speedy, accessible, and precise justice, alone or in combination, have powered a variety of reforms and experiments that fit our earlier general definition of civil diversion. Subsequent chapters of this report describe and appraise actual operating examples of many reforms and experiments. But for now, we merely present an outline of the diverse approaches.

At the outset there appear to be three fundamental methods of diverting entire disputes or specific issues from the regular courts:

(1) measures that make it unnecessary to invoke dispute resolution machinery in order to afford relief;

(2) measures that render it unnecessary to decide certain complex, time-consuming issues in order to afford relief; and,

(3) measures that transplant the dispute and all underlying issues to another forum capable of deciding with more speed, at less cost, or with greater precision.

Measures Obviating the Need to Resolve a Dispute

In virtually all disputes in the courts, one party is seeking something from another: compensation for injuries sustained in an automobile accident, recovery of a past-due debt, repair of a new television set purchased under a maintenance guarantee, removal of a tenant from the landlord's rented premises, or issuance of a welfare check being withheld by a government administrator. Such disputes eventually reach the courts only if and when the seeking party[12] is unable to gain the desired result without the assistance of a judicial order, a sheriff, or the other powers of compulsion monopolized by the state.

Diversion seeks to make justice more accessible by making it less expensive.

The most direct means of diverting disputes from the courts is simply to give the seeking parties what they want before they deem it necessary to invoke the coercive power of the judiciary. This does not necessarily mean that the seeker must obtain the objective at the expense of the opposing party. The essential element is to achieve the end without recourse to the courts.

No-fault automobile compensation is a type of civil diversion in which the grievant is awarded a remedy without fixing responsibility on the party who caused the injury. Instead of looking to the other driver for damages—a process that usually necessitates litigation—the injured party collects from an insurance pool to which he has contributed pursuant to a contract granting relief irrespective of who was at fault. Consequently, intervention by the court is usually unnecessary and the entire dispute is diverted from the judicial arena.[13] Similarly, probate reforms fostered by the Uniform Probate Code have recognized that there is no need to resort to the court unless there is in actuality some dispute between parties. Thus estates may be administered informally and independently of the court unless the representative or an interested party feels the need to invoke the court's aid on a certain issue.[14]

Measures Obivating the Need to Decide Certain Issues

Once a party seeking relief is compelled to enter the courts, the length and cost of his litigation will depend upon the number and complexity of the facts he must prove. Some legislation has been enacted to reduce the number or complexity of the issues that must be decided by the court in order to grant relief. The judicial proceeding thus becomes briefer, the cost to both government and the parties lower, and the remedy speedier and more accessible for the moving party.

Among early examples of this partial diversion are the special landlord-tenant proceedings enacted in many jurisdictions. To expedite rent collections for landlords, these statutes typically create a separate court empowered to hear eviction cases. Unlike other courts, these tribunals are empowered to consider only a few of the issues that may be implicated in a given landlord-tenant dispute, principally the question of whether the tenant has paid his rent when due. Many of the defenses a tenant might possess or other complicating issues are irrelevant in landlord-tenant court. The landlord is entitled to his relief without any decision on these questions. If they are to be raised, it must be in a separate proceeding in the ordinary courts. In the meantime, the landlord must be paid or the state will execute an eviction on his behalf.

Access to the courts is unequally distributed, and the results are likely to be inequitable.

Landlord-tenant proceedings illustrate the dangers inherent in any reform which diverts certain issues as a means of speeding justice in the courts. Unless carefully conceived, the diversion may discriminate unfairly against one class of litigants, in effect denying them the opportunity to raise issues which might be helpful to them. As a result, access to the courts is unequally distributed, and the results are likely to be inequitable. Landlords are offered ready access to a speedy procedure dispensing inexpensive relief. The tenant, in order to raise valid defenses, is relegated to the cumbersome, often prohibitively expensive alternative of full-scale litigation in the ordinary courts.[15]

Recently, a more equitable example of partial diversion has come to the fore, embodied in the so-called "no-fault" divorce.[16] In states enacting this reform, no longer must a husband or wife go to the trouble and expense of establishing complex facts about the other's conduct. No longer must the courts expend their time and resources on lengthy hearings on those facts. A moment's testimony about irreconcilable differences justifies the court's granting a divorce.

Measures Which Transplant Disputes to Other Forums

In millions of cases each year there simply is no reasonable possibility of a remedy in the absence of some intervention by a dispute resolving forum, and many of those disputes require some decision about relatively complex issues. Yet if speed or cost-reduction is at a premium, it may be feasible to channel some controversies away from the regular courts to another tribunal better suited to the task. In the past, this ordinarily has meant diversion to small claims courts or administrative tribunals not unlike the regular courts in their operation and effect. However, more and more disputes are now being shifted to arbitration or informal tribunals utilizing noncoercive techniques.

Arbitration[17] is an ancient concept, in some jurisdictions predating the formal judicial system. The term now embraces an amorphous collection of dispute resolution techniques. Some are difficult to distinguish from full-scale court proceedings and others demonstrate the informality, simplicity and nonlegalistic aura of a family conference. If there is a common element in these mechanisms, it is that the decisionmakers are not government employees like judges or administrative hearing officers. Rather, they are private citizens selected by the parties or chosen on a random basis from lists of those deemed capable of making knowledgeable judgments.

Traditionally, disputes have been diverted to arbitrators because the parties voluntarily chose that forum after the controversy arose or because they had contracted to use arbitration to resolve future disputes between them. However, chiefly for reasons of judicial economy, some states have begun to mandate that certain disputes be diverted to an arbitration system, generally operating under court supervision. Elsewhere, courts strongly encourage, without insisting, that disputes be submitted to such court-annexed arbitration.

The most rapidly expanding type of civil diversion is the noncoercive forum.

The most rapidly expanding type of civil diversion is the noncoercive forum. Ombudsman officers, media "hot lines," and consumer complaint centers such as the Better Business Bureaus[18] may be sponsored by different organizations with unconnected, even conflicting motivations but with similar stated goals and general techniques. Each of these institutions purports to seek relief for aggrieved parties, and each pursues that relief through informal pressures exerted on the individual, government agency, or business responsible for the grievance. In these negotiations, a media hot line wields the threat of publicity on television or in a newspaper column. A government ombudsman can file confidential reports about bureaucratic errors with the legislature, or, if that is ineffective, expose a recalcitrant administrator in public statements. If they choose, Better Business Bureaus can energize social pressures within the commercial community, in its extreme a virtual blacklist if an enterprise refuses to compensate customers.

The efficacy of this approach obviously depends upon the true weight of the available sanctions and the institution's willingness to deploy them. But when this approach is successful, a dispute which might have reached the courts is resolved and the strain on judicial resources reduced accordingly.

SCOPE OF THE REPORT

Not all the specific measures mentioned in this excerpt are explored in detail in the complete report. Most are touched upon, but only a select few are scrutinized closely. In general, an attempt was made to choose recent, well financed examples of each basic diversion approach outlined above. The selection also was influenced by the availability of substantial data. The resources and time constraints of this project did not permit collection of raw statistics, administration of standard interview questionnaires, or any other techniques of empirical research. Accordingly, the authors were compelled to rely upon existing data and analyses. In some instances, these were supplemented by personal interviews with key participants and observers—lawyers, judges, arbitrators, and professors.

Chapter Two of the complete text surveys the possibilities of affording relief without affixing responsibility on any other person or institution. The focus is on no-fault automobile compensation.

Chapter Three outlines the kind of reform enabling individuals to dispense with court supervision in cases where there is actually no dispute. Probate reform provides the focus; the concept of independent administration constitutes the heart of the discussion.

Chapter Four discusses the simplification of the substantive issues that must be decided before the state will invoke its coercive power to compel relief (or elect to deny relief). Most of the discussion focuses on no-fault divorce, the most significant recent manifestation of this approach.

Chapter Five treats the diversion of disputes, with all their complexities, to alternative tribunals possessing coercive power, yet presumably either more expeditious or less costly. In this instance arbitration in its many forms occupies the center stage.

Chapter Six deals with informal alternative tribunals that supply relief through noncoercive measures which motivate the responsible individual or institution to furnish that relief. The examples chosen for examination include governmental ombudsmen and media-operated consumer complaint centers.

Chapter Seven returns to some of the themes and issues introduced in this overview. With the specifics digested it may be feasible to spell out several hypotheses, if not conclusions, about the potential utility of various diversion alternatives. In Chapter Seven we also seek to unearth some proposals, not yet the subject of experimentation anywhere, which might implement the same basic theoretical approaches. ☐

NOTES

[1] In the state of California alone, 1,229,749 new civil cases were filed during fiscal year 1974-1975. Of these, 448,702 were filed in the superior courts, 711,913 in the municipal courts and 69,134 in the justice courts. 1976 Judicial Council of Cal., Ann. Rep. 100, 126, 134 [hereinafter 1976 California Judicial Council Report]. This approximates five new cases for every 100 people in the state, or, extrapolating to the United States as a whole, over 10,000,000 new filings per year.

[2] In California, the number of authorized judgeships in the trial courts increased by an average of thirty judicial positions each year for the decade from fiscal year 1964-1965 to 1974-1975, an average of fifteen new superior court judgeships and fifteen new municipal court judgeships per year. *Id.* at 98, 125. This would extrapolate to approximately 300 new trial court judgeships each year on a national basis.

[3] Chicago, New York (the Bronx), Boston and Philadelphia are among the jurisdictions which reported delays in excess of four years between answer and trial in personal injury cases. Institute of Judicial Administration, Calendar Status Study vii (1973).

[4] This is the average reported for personal injury cases. *Id.* at vi. In larger communities (over 750,000 population) the average increases to 27.3 months. *Id.*

[5] In any event, the shortage of judicial resources may be part of the problem and a substantially increased investment in the judiciary a part of the solution. Judge Hufstedler points out the paucity of the present level of investment when she asks: "Is it not absurd that the United States spends about 1/10 of 1 percent of its budget to support the whole federal judiciary, and the states lavish less than ½ of 1 percent of their budgets on their judicial systems?" Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System,* 44 S. Cal. L. Rev. 901, 905 (1972). We may gain some further perspective on the adequacy of the current American commitment to its judicial system from a comparative study in progress by the Law Center and the Social Science Research Institute, University of Southern California under a grant from the National Institute of Law Enforcement and Criminal Justice of the U.S. Law Enforcement Assistance Administration. This study seeks to compile data concerning the size, financing and performance of judicial systems in six analogous industrialized nations and compare these indicators with similar data from United States jurisdictions.

[6] These financial barriers obviously would discriminate against certain litigants—the poorer citizens—and certain claims—the lesser ones.

[7] *See, e.g., United States v. Kras,* 409 U.S. 434 (1973) and *Ortwein v. Schwab,* 410 U.S. 656 (1973), in which the Supreme Court upheld the constitutionality of filing fees, which can bar many low-income litigants from the courts.

[8] A recent study illustrates the importance of the relation between probable litigation cost and the amount in dispute. D. Caplovitz, *Debtors in Default* (1970). Caplovitz reports that many debtors decided against defending collection suits even though they had ample funds to employ a lawyer and were convinced they possessed a valid defense. Another study, conducted by the Department of Transportation, estimated that 80 percent of the amount recovered in automobile accident litigation was spent by the parties in processing the case (43 percent by plaintiff, and 37 percent by defendant). *See E. Johnson, Jr., et al., Access to Justice in the United States: The Economic Barriers and Some Promising Solutions* (in press).

[9] "[T]he Justices. . . shall assign to the same poor person or persons counsel learned, by their discretions, which shall give their counsel, nothing taking for the same. . . likewise the Justices shall appoint attorney and attorneys for the same poor person or persons. . . ." 2 Hen. 7, c. 12 (1495).

[10] It has been estimated that currently the Legal Services Program has been able to satisfy the needs of only 25 percent of those with the need for such services. *L. Goodman & M. Walker, The Legal Services Program: Resource Distribution and the Low Income Population,* at 14 (1975). Per capita expenditure on civil legal aid in the United States is one-quarter that of Sweden and Quebec Province, Canada, and one-third that of England. *M. Cappelletti, J. Gordley & E. Johnson, Jr., Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (1975).

[11] *See* Chapter Five, "General Evaluation of Court Annexed Arbitration."

[12] In this part of the discussion, the neutral term "seeking party" is used in lieu of the more traditional "plaintiff," "injured party" and the like in an effort to connote an all-encompassing description of one side of every dispute.

[13] No-fault automobile compensation is discussed in Chapter Two. Obviously, no-fault does not guarantee the *permanent* diversion of every claim covered by such insurance. There is still the possibility of a dispute between the insured and his insurance company, a controversy that might require resolution in the courts. Nevertheless, it appears that relatively few disputes arise between the injured party and his insurance company over these first party claims. See Chapter Two, "Appraisal of Factors Influencing the Impact of No-Fault Automobile Compensation."

[14] Probate Reform is discussed in Chapter Three.

[15] *See Lindsey v. Normet,* 405 U.S. 56 (1972), in which the Supreme Court upheld the constitutionality of Oregon's summary eviction statute even though "Affirmative defenses such as the failure of the landlord to make repairs or that the motivation for the eviction was retaliation for a report by the tenant of a violation of a housing code are apparently precluded." *Id.* at 86 (Douglas, J., dissenting).

[16] No-fault divorce is discussed in Chapter Four.

[17] Arbitration is discussed in Chapter Five.

[18] Ombudsman, media hot lines, Better Business Bureau and other consumer mechanisms are all discussed in Chapter Six.

Outside the Courts: A Survey of Alternatives in Civil Litigation *is available in paperback at $6.50 per copy from: Publications Department, National Center for State Courts, Suite 200, 1660 Lincoln Street, Denver, Colorado 80203.*

BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Better Management Can Ease Federal Civil Case Backlog

The number of pending civil cases in Federal district courts increased over 70,000 between 1974 and 1979, creating a concern on the part of the Congress, the Judiciary, the Department of Justice, and the public.

GAO visited nine courts and found that the intensity of the backlog problem was directly related to the efficiency of case management. Ineffective use of personnel and an inadequate number of judges also affected the processing of civil cases.

GAO recommends modifying the Federal Rules of Civil Procedure as an appropriate way to help reduce the backlog. The Administrative Office of the United States Courts disagrees. In contrast, four chief judges and the Justice Department agree that a modification providing for flexible time frames would improve the efficiency of the civil process.

UNITED STATES GENERAL ACCOUNTING OFFICE

GGD-81-2
FEBRUARY 24, 1981

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-196664

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses actions necessary to deal with civil case backlog in Federal district courts. In chapter 2, we recommend that the Judicial Conference initiate actions that will improve the operations of Federal district courts and thereby minimize the backlog of civil cases.

We made this review to determine whether and why a backlog exists and what could be done to alleviate the backlog. By developing and enforcing a case management system, in conjunction with the increased utilization of court resources, the operational effectiveness of Federal district courts will improve and civil case backlog will be reduced.

Copies of this report are being sent to the Director, Office of Management and Budget; the Chairmen, House and Senate Judiciary Committees; the Director, Administrative Office of the United States Courts; the Chairman, Judicial Conference of the United States; the Attorney General; and the chief judge of each Federal district court.

Elmer B. Staats
Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

BETTER MANAGEMENT CAN EASE FEDERAL CIVIL CASE BACKLOG

DIGEST

The number of pending cases in Federal district courts increased 66 percent between 1974 and 1979. This increase has created a concern on the part of the Congress, the Judiciary, the Department of Justice, and the Public. Processing a large volume of cases requires the development and enforcement of a case management system, use of magistrates and clerks' offices, and an adequate number of judges. GAO found that the degree to which the courts visited experienced a backlog problem correlated with the extent to which these key requirements were satisfied. Improved court administration would minimize this problem.

A SOUND CASE MANAGEMENT SYSTEM CAN IMPROVE THE CIVIL PROCESS

A sound case management system must incorporate the following features:

--Uniform case management procedures.

--Early definition of time frames for each case.

--A monitoring system for identifying cases not adhering to predetermined time frames and not being actively litigated.

--Enforcement of a court's time frames through the use of sanctions.

Consistently and effectively applied, such a case management system would expedite the processing of civil cases and minimize case backlogs.

GGD-81-2

Tear Sheet. Upon removal, the report cover date should be noted hereon.

Review of 782 closed case files that took 1 year or longer to terminate in 9 district courts indicated that the average time spent for the civil process was shorter for those courts which had effectively implemented a case management system. Also, judges who had effectively implemented a case management system had a lower pending caseload than those judges without such a system. (See pp. 10 to 18.)

BETTER USE OF COURT RESOURCES CAN EASE CIVIL CASE BACKLOG

Courts were not taking full advantage of magistrates or personnel from the clerks' offices to assist in processing civil cases.

Courts and judges that used clerks' offices for administering case management and docket control systems had fewer backlog cases than those that did not take advantage of this resource. The use of the clerk's office in such a fashion helps reduce the administrative burden on judges and increases the pace of litigation. (See pp. 18 to 21.)

Although the intent of the Federal Magistrate Act of 1979 was to provide additional judicial resource flexibility for district courts, five of the nine courts had not fully utilized their magistrates. Many judges in these courts were unwilling to assign civil case duties to the magistrates because they (1) believed magistrates do not expedite the civil process since their decisions can be appealed to the court, (2) wanted full control of all cases, and (3) believed the opportunities for settlement were greater if they presided over all conferences. (See pp. 21 and 22.)

LACK OF JUDICIAL MANPOWER HAS CONTRIBUTED TO THE CIVIL BACKLOG

Although the inefficient use of resources can increase the backlog, the lack of resources can also be a factor. Five of the nine courts visited experienced shortages of judges because of extended illness or involvement in time-consuming cases. Although an adequate number of judges is needed to effectively dispose of cases, it must be recognized that timely processing of large volumes of cases requires a combination of good court administration as well as sufficient resources. This was evidenced by the fact that the courts which practiced sound case management were better able to cope when a shortage of judges was a problem. (See pp. 22 to 24.)

RECOMMENDATIONS TO THE JUDICIAL CONFERENCE

To improve the operations of the Federal district courts and to reduce the backlog of civil cases, the Judicial Conference should:

--Develop a proposed amendment to the Federal Rules of Civil Procedure to include maximum time limits for the various steps in the civil process and require each court to establish time frames within these limits. The Federal Rules also should authorize a judge to waive the time limits for good cause shown, such as case complexity, and to establish alternate time frames where appropriate.

--Encourage the district courts to better utilize their clerks' offices in the administration of the courts, particularly for case management and docket control systems.

- --Encourage the district courts to make greater use of magistrates as provided in the Federal Magistrate Act of 1979.

AGENCY COMMENTS AND GAO'S EVALUATION

Of the nine Federal district courts visited, eight chief judges provided comments on this report. The remaining chief judge offered no comments. Three of the eight chief judges fully agreed with the basic thrust of the report, while the remaining five generally agreed but in some cases expressed reservations about such factors as case complexity and the Speedy Trial Act.

The Administrative Office of the U.S. Courts endorses the report's recommendation regarding delegation of case management to the clerks of the court and greater use of magistrates. However, the Office does not believe the modification to the Federal Rules of Civil Procedure is an appropriate means by which to reduce civil case backlog. In contrast, four chief judges and the Justice Department agree that a modification providing for flexible time frames would improve the efficiency of the civil process. (See pp. 26 and 27.)

Four of the courts said that the Speedy Trial Act significantly contributed to the civil case backlog problem. The results of GAO's review found that even though the Act had an impact on the courts' operations, the severity of the impact depended on how well a court managed its caseload and used available resources. A Justice Department study reached a similar conclusion. (See pp. 29 and 30.)

The Department of Justice agrees with the report's overall message that a sound case management system and adequate use of court resources is important in reducing civil case backlog. (See p. 27.)

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CHAPTER 1

INTRODUCTION

The issue of civil case backlogs and their impact on Federal district courts is of concern to the Congress, the Department of Justice, the Judiciary, and the public. This concern stems from the fact that civil filings have increased from 103,530 in 1974 to 154,666 in 1979. During this period, the number of pending civil cases increased from 107,230 to 177,805. Since there was no accepted definition of backlog, however, no one had identified the magnitude of the backlog, the reasons for its existence, or what corrective action was needed to reduce it.

OBJECTIVES, SCOPE, AND METHODOLOGY

We initiated our review to determine whether and why a backlog exists and what could be done to alleviate the backlog. Due to the lack of a definition, we defined backlog as those cases pending 1 year or longer from date of filing. On the basis of this definition, we selected 9 Federal district courts for review 1/ and sampled 1,989 cases out of a universe of 18,807. The courts visited were compared to determine the reasons why some had a larger backlog problem than others. We limited our review to the Federal district court level, because this is the level in the judicial system where cases are initially tried and decided. For further details on the scope and methodology, see chapter 4.

TYPES OF CASES AND CIVIL CASE BACKLOG

Civil cases are filed in Federal district courts to obtain a resolution to a civil controversy and to seek a monetary or other form of remedy. In statistical year 1979 (July 1, 1978, to June 30, 1979) the top four categories--representing about 66 percent of all civil cases filed in Federal district

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1/Arizona, Central District of California, Connecticut, Southern District of Indiana, Eastern District of Kentucky, Maryland, Massachusetts, Northern District of Ohio, and Eastern District of Virginia courts--involved contract disputes, tort (personal injury related) actions, prisoner petitions seeking sentence reductions or civil rights relief, and private civil rights complaints. The majority of the civil cases filed involved two private parties rather than the U.S. Government.

The civil caseload has increased steadily over the last 11 years, while the criminal caseload has declined. The following chart illustrates the increase in civil filings by nature of the suit in addition to the criminal filings for statistical years 1969 and 1979.

	Statistical year ending	
	June 30, 1969	June 30, 1979
Nature of Civil Filings		
Contract actions	14,951	36,898
Real property actions	3,737	11,876
Tort actions	24,713	28,901
Actions under statutes	31,232	76,067
Other actions	2,560	924
Total civil filings	77,193	154,666
Total criminal filings	33,585	31,536

Civil cases involving the United States as either a plaintiff or defendant represented 36 percent of total filings for 1979 and were composed mainly of social security petitions, land condemnation cases, and contract cases.

Although the significant increase in civil filings has had an impact on the judicial system, there is no objective criteria to measure when a court becomes overburdened and a backlog begins. Some officials of the Administrative Office of the U.S. Courts define a backlog as cases where the parties are ready to go to trial but the court is unable to try the cases. No data, however, is available on cases fitting such a definition. Therefore, the impact of the increased filings is not entirely known. Although it is possible to identify backlogged criminal cases as those not meeting the Speedy Trial Act's (18 U.S.C. 3161-3174) 1/ time frames, a similar approach cannot be used for civil

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1/The act established uniform time frames for stages in the criminal process, such as arraignments and trials, that must be followed by U.S. district courts.

cases. The Federal Rules of Civil Procedure specify certain time limits for particular actions within a case; however, these rules do not define when a case is considered backlogged nor do they establish time frames for the entire civil process.

Due to the lack of a definition, we defined a backlog as those cases which had been pending in the court for 1 year or longer after being filed. Fifty-seven of the 71 judges interviewed agreed that the criterion we established was reasonable and that the majority of civil cases could be completed within 1 year. However, some judges noted that case complexity can cause a minority of cases to be pending for over a year. The judges who disagreed with our criterion did so either because they believed the majority of civil cases take longer than 1 year to terminate, or that each case is atypical and therefore defies application of any criteria.

On the basis of the 1 year or older definition, we determined that the backlog problem varies across the judicial system. In fact, 60 percent of all cases pending 1 year or longer as of June 30, 1979, were concentrated in 20 of the 95 district courts. These 20 courts accounted for about 39 percent of all civil cases filed during the 3-year period ending June 30, 1979.

ADMINISTRATIVE STRUCTURE OF THE JUDICIARY

The judicial branch of the Government has three levels of administration--the Judicial Conference of the United States, the judicial councils of the 11 circuits, and the district courts. Associated with this structure is the Administrative Office of the U.S. Courts.

Judicial Conference of the United States

The Judicial Conference consists of 25 members: the Chief Justice of the United States, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a chief and district judge from each of the 11 circuits.

The Judicial Conference is a policymaking body for the Federal judicial system. Its areas of interest include court administration, assignment of judges, just determination of litigation, general rules of practice and procedures, promotion of simplicity in procedures, fairness in administration, and elimination of unjustifiable expense and delay.

Except for its direct authority over the Administrative Office, the Judicial Conference is not vested with the day-to-day administrative responsibility for the Federal judicial system.

Judicial councils

The United States is divided into 11 judicial circuits, each containing a court of appeals (circuit court) and from 1 to 18 district courts. Each of the 11 judicial circuits has a judicial council consisting of the circuit court judges and presided over by the chief judge of the circuit. The councils are required to meet at least twice a year. Each judicial council considers the quarterly reports on district court activities prepared by the Administrative Office and takes such action as may be appropriate. Additionally, the councils promulgate orders to promote the effective and expeditious administration of the business of the courts within their circuits.

Each judicial council may appoint a circuit executive to exercise administrative power and perform duties delegated by the council.

U.S. district courts

Each State has at least one district court, and some have as many as four. There are 89 district courts in the 50 States and 1 each in the District of Columbia and the Commonwealth of Puerto Rico. There are also four territorial courts, one each in the Canal Zone, Guam, Virgin Islands, and Northern Mariana Islands.

The standard rules of civil and criminal procedures for the U.S. district courts provide the general rules of practice for these courts. The judges of each district court, however, formulate local rules and orders and generally determine how the court's internal affairs will be handled.

Each court has a clerk of the court who is appointed by and is directly responsible to the district judges. The clerk is the court's fiscal and disbursing officer and is responsible for maintaining the court's records and performing other court-assigned duties. He functions as the court's executive officer and attempts to promote administrative procedures which will help move the court's work expeditiously.

Administrative Office of the United States Courts

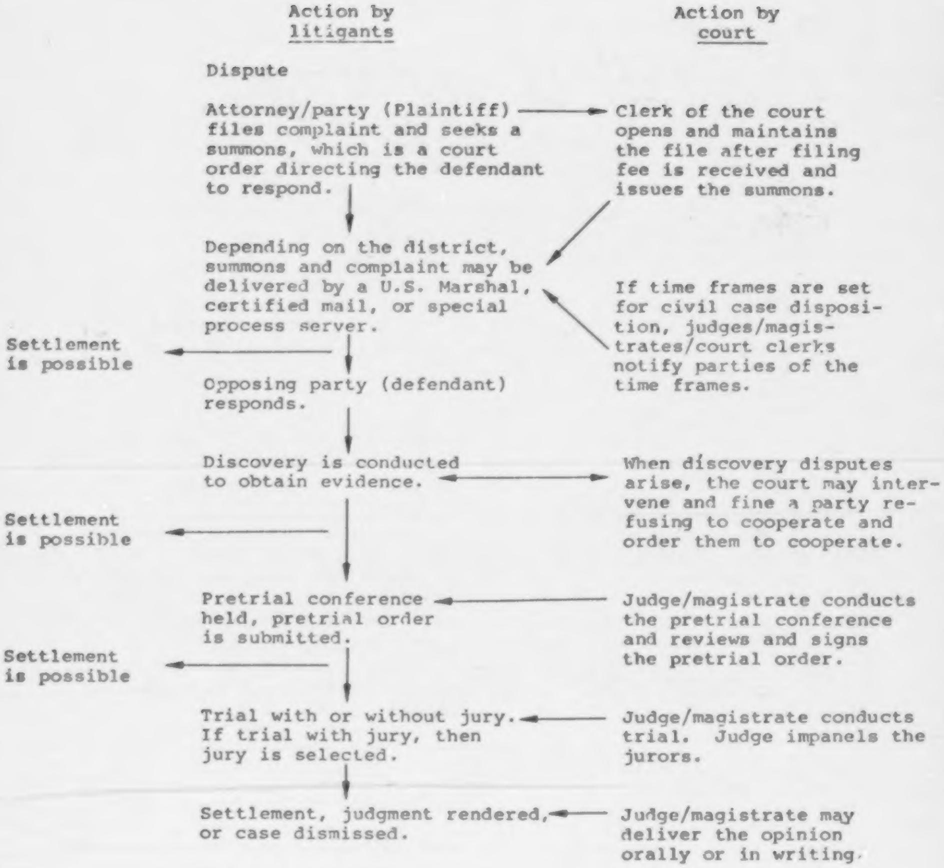
The Administrative Office is headed by a Director and a Deputy Director appointed by the U.S. Supreme Court. The Director is the administrative officer of all U.S. courts except the Supreme Court. Under the supervision and direction of the Judicial Conference, the Director

- --supervises administrative matters relating to the office of the clerks and other clerical and administrative court employees;
- --prepares and submits various reports regarding the state of the court dockets and other statistical data to the chief judges of the circuits, the Congress, the Attorney General, and/or the Judicial Conference; and
- --audits vouchers and accounts of the courts and their clerical administrative personnel and determines and pays the necessary expenses of courts, judges, and other court officials.

Also under the purview of the Administrative Office are the U.S. magistrates. In the Federal judicial system, the magistrates are judicial officers of limited tenure authorized to handle, within certain limitations, criminal and civil matters. Such matters include supervising the criminal and civil calendars and handling pretrial proceedings, including discovery conferences, settlement conferences, and issuing subpoenas.

ROLE OF THE COURTS, LITIGANTS, AND ATTORNEYS IN THE CIVIL PROCESS

Federal district courts not only have a role in criminal matters, they also have a role in the civil process when they enforce Federal civil statutes, resolve controversies between citizens of different States, and hear other cases within their jurisdiction. The following chart describes the basic Federal civil process.



	Action by litigants	Action by court
	Dispute	
	Attorney/party (Plaintiff) files complaint and seeks a summons, which is a court order directing the defendant to respond.	Clerk of the court opens and maintains the file after filing fee is received and issues the summons.
	Depending on the district, summons and complaint may be delivered by a U.S. Marshal, certified mail, or special process server.	If time frames are set for civil case disposition, judges/magistrates/court clerks notify parties of the time frames.
Settlement is possible		
	Opposing party (defendant) responds.	
	Discovery is conducted to obtain evidence.	When discovery disputes arise, the court may intervene and fine a party refusing to cooperate and order them to cooperate.
Settlement is possible		
	Pretrial conference held, pretrial order is submitted.	Judge/magistrate conducts the pretrial conference and reviews and signs the pretrial order.
Settlement is possible		
	Trial with or without jury. If trial with jury, then jury is selected.	Judge/magistrate conducts trial. Judge impanels the jurors.
	Settlement, judgment rendered, or case dismissed.	Judge/magistrate may deliver the opinion orally or in writing.

As one can see from the chart, once the complaint is filed, the court has responsibility until the case is resolved.

Rule One of the Federal Rules of Civil Procedure states that the rules are designed to secure the just, speedy, and inexpensive termination of every action. In this regard, both judicial personnel and attorneys have a responsibility for insuring that cases conform with Federal and local procedural rules. The clerk of the court is the executive officer who is responsible for court administration. As such, he/she is responsible for expediting the civil process by making sure that attorneys and parties conform to Federal and local rules of procedure--tracking the cases via docket entries, maintaining the court files and exhibits, assisting in case management, and performing other administrative duties.

To promote expeditious disposition, judges may (1) establish time frames by a scheduling or pretrial order, (2) enforce such time frames by denying continuances and imposing sanctions, (3) conduct status conferences, pretrial conferences, or settlement conferences, and (4) resolve discovery problems by issuing an order compelling discovery or imposing sanctions. To provide assistance in carrying out these functions, the Federal Magistrate Act of 1979 (P.L. 96-82, 93 Stat. 643) was passed expanding the magistrates' role and allowing magistrates who are certified to try and decide civil cases upon the consent of litigants and judges.

CHAPTER 2

IMPROVEMENTS ARE NEEDED IN CASE MANAGEMENT AND USE OF COURT RESOURCES FOR SPEEDY TERMINATION OF CIVIL DISPUTES

The upward trend in the number of civil filings is likely to continue due to the fact that new legislation continues to expand litigants' access to Federal courts. Old legislation is being revitalized by litigants looking for avenues of relief, and courts are being increasingly sought as the final arbiter. Unless improvements are made in the way courts presently operate, the increased filings will result in a severe backlog of civil cases. To expedite the disposition of civil cases and minimize case backlog, the following are necessary: (1) a case management system that is consistently applied and enforced, (2) increased utilization of magistrates and personnel in the clerks' offices, and (3) an adequate complement of judges.

In the nine Federal district courts visited, we identified four factors as being essential to effective case management: (1) the establishment of uniform court procedures, (2) the early establishment by the court of civil case time frames and deadlines, (3) court monitoring of these time frames, and (4) enforcement by the courts of the time frames. The courts visited that had a large number of cases pending 1 year or longer had weaknesses in some or all four areas. These courts also lacked a consensus among judges on the need for case management and control. Within each court, judges who effectively practiced case management had lower pending caseloads than their colleagues.

To further improve the handling of civil cases, the courts need to reassess the duties and responsibilities of magistrates and clerks. The clerks' offices can assist judges in maximizing their effort by handling the overall case monitoring and routine administrative activities. Magistrates are able to handle the full range of steps in the civil process upon the consent of the litigants and the court. Yet, certain courts visited which could have more effectively utilized the magistrates' and clerks' offices to alleviate their backlog did not do so, primarily because judges would not relinquish such duties to them.

Also vital to strong case management is an adequate complement of judges which was not always available. In one court, control of the civil docket was completely lacking due to an inadequate number of judges to deal with increased filings at numerous geographical court locations. Courts also experienced a shortage of judges when judges became ill for long periods of time and when judges became involved in cases that consumed a great deal of time.

Collectively, all of these factors are necessary to expedite the civil process and alleviate the backlog problem. The courts visited with strong case management and resource utilization practices incurred minimal impact from sudden changes in filings and caseloads, while courts with poor case management and resource utilization practices experienced problems in processing their cases.

LEGISLATION AFFECTS CIVIL CASES IN FEDERAL DISTRICT COURTS

Over the last decade, new and revitalized legislation has affected the operations of the Federal district courts by placing new and added demands on the courts' services. This is reflected by the near doubling of civil case filings in Federal district courts. In some districts, the added filings have disrupted court operations and taxed the courts' resources. How each Federal district court has adapted to the new demands is still not fully known. However, we observed that the courts which developed and implemented case management systems were better able to accommodate new demands with minimal impact on court operations.

Enactment and revitalization of legislation have expanded litigants' access to Federal courts and have contributed to the increased filings of civil cases. In recent years, the Congress has passed numerous laws which have increased the district courts' caseload. Certain legislation, such as the Black Lung Benefits Act (30 U.S.C. 901 et seq.), which expanded miners' access to the district courts for administrative review and appellate purposes, has contributed to a chronic backlog in one court visited. Prisoners, mostly from State prisons, have made new use of an existing Civil Rights Act (42 U.S.C. 1983) and habeas corpus legislation (28 U.S.C. 2254) to challenge their conditions of confinement and convictions directly in Federal district courts without exhausting State remedies. During the year ending June 30, 1979, prisoners filed 23,000 petitions, which represented 15 percent of all Federal district courts' civil case filings. Because many of these cases are filed by the litigant rather than an attorney, courts visited complained these petitions consume a disproportionate amount of court personnel time because court personnel serve both as counsel and judge. Barring major changes, it is highly likely that increased civil case filings will continue placing new demands on the Federal district courts.

A SOUND CASE MANAGEMENT SYSTEM CAN IMPROVE THE CIVIL PROCESS

The development and enforcement of a case management system can expedite the civil process. Courts which effectively and consistently applied case management techniques had an expeditious civil process and minimized civil case backlogs. The courts which consistently practiced strong case management had a less severe backlog than the courts that did not. Further, judges who effectively applied and enforced case management had a lower pending caseload than judges who either ineffectively applied case management or who lacked a case management system.

Crucial to an effective case management system are four components:

--The establishment of uniform case management procedures.

--The establishment of case time frames to insure that the case is will proceed expeditiously and that realistic objectives are set for attorneys.

--The court monitoring of pleadings and established time frames to insure that Federal rules, local rules, and each judge's orders regarding time frames are being complied with.

--The enforcement of time frames to insure that the court's management and control over its docket are maintained and that its control is credible.

How successful a court is in expediting and disposing of its civil cases is dependent on how uniformly and strictly the above components are applied within the court. Strong court control of the civil docket can be a major factor in reducing the court's civil backlog and speeding up the civil process. If only a minority of judges within a court practice case management, the court as a whole will not be effective in expediting civil cases. If a court fails to monitor and implement time frames, then the court will have difficulty in disposing of civil cases in the most expeditious manner to prevent or minimize the backlog.

Need to establish case management systems with time frames

The establishment of time frames for the various steps in the civil process soon after a case has been filed is crucial to an effective case management system. District courts which established time frames (1) had the least number of cases pending a year or longer and (2) completed the civil process in less time for cases that took a year or longer to terminate. In the courts which had a minimal backlog, the majority of judges relied on a case management system which encompassed the early establishment of time frames. Although the time frames established varied in these districts, they generally fell within 1 year from filing of the complaint. In the districts that had a backlog problem, the majority of judges did not establish time frames. The judges blamed inadequate judicial resources and court congestion as the primary reasons why they were unable to control the civil docket and their calendars. Further, certain judges believed that the court should not attempt to control the pace of litigation--such control being the attorneys'. However, to insure expeditious court actions, the courts must take a more active role in controlling the pace of litigation.

Although the establishment of time frames is essential to alleviate a backlog problem, the Federal Rules of Civil Procedure do not contain provisions concerning overall case management. Although the Federal Rules of Civil Procedure do provide some time limits as to when certain pleadings and motions are due, they provide little overall guidance on the amount of time which should be allotted for various steps in the civil process. Specifically, there are no Federal rules governing the establishment of time frames for essential steps, such as delivery of the summons, motions for summary judgements and reply motions, discovery completion, submission of status reports, pretrial orders, exhibit and witness lists, jury instructions, and trial proceedings and/or hearings. The review of 782 closed case files that took 1 year or longer to terminate in nine district courts showed that the median times spent for the civil process was shorter for those courts which established and enforced time frames than for those which did not.

The lack of Federal rules governing overall case management has resulted in a variety of local court rules and judges' orders establishing procedures and deadlines designed to expedite the civil process. Eight of the nine courts visited had local rules of procedure governing civil cases. However, only the courts with a minimal backlog actually enforced their local rules.

These rules, by and large, provided procedures for processing civil cases, including such aspects as delivery of the summons, deadlines for motions, discovery document limitations, pretrial order requirements, court penalties for attorney tardiness, and late settlements. The following table illustrates local rules that expedite the civil process.

Civil case stage	Local rule	Intended effect
Delivery of summons	If a defendant is not served a summons within 60 days from the date the summons is issued, the case can be dismissed by the clerk.	To eliminate inactive cases from the court docket.
Deadlines for motions	Any opposing motions must be filed within 14 days after the filing of the initial motion. Also, a reply to the opposing motion must be filed within 10 days.	To impose time frames on filing opposing motions.
Discovery document limitations	No party shall serve upon any other party more than 30 written interrogatories including parts and subparts.	To eliminate frivolous interrogatories and confine discovery to essential legal issues.
Pretrial order requirements	Require plaintiff's attorney to file a proposed pretrial order in the judge's chambers no later than 5-days before the pretrial conference. The proposed order must be signed by attorneys of all parties and should include; (1) a brief statement of facts that each plaintiff and defendant proposes to prove, (2) a listing of exhibits to be introduced as evidence, and (3) a listing of witnesses for each party.	To insure the case is ready for trial and to control the number of exhibits and witnesses.
Attorney tardiness or failure to appear	Any attorney who is late or fails to appear for a hearing or conference shall be fined $25.00 for the first and $50.00 for second nonappearance or lateness unless otherwise ordered by the court for good cause shown.	Encourage attorneys to meet time frames.
Late settlements	If parties settle but fail to notify the court at least one full business day prior to the scheduled trial date, jury costs and Marshals' fees will be imposed.	To prevent unnecessary cost and delay to the court.

Specific case time frames for individual cases are usually provided by judges' orders. In the districts with a minimal backlog, the majority of the judges established case time frames in adherence to the local rules early in the civil process. For example,

--In one district, although different scheduling practices existed in each of the district's divisions, time frames were established for the key steps in the civil process, and civil cases were generally scheduled for trial between 6 months to 1 year from the filing date. For example, in one division of the court, the majority of civil cases are scheduled for trial within 5 to 6 months after the initial pretrial conference.[1] At the initial pretrial conference, conducted no later than 2 weeks after an answer is filed, a clerk scheduled and recorded on a pretrial worksheet all cut-off dates for discovery and set dates for the attorneys' conference, final pretrial conference and trial. Any trial date set more than 6 months from the date of the initial pretrial conference required permission of the court--in most instances, the chief judge.

--In another district that had local rules designed to expedite the civil process, the majority of judges--five out of seven--established time frames, usually via scheduling orders. The time frames limit discovery, set dates when motions are due, and establish a date for pretrial activities. Total time allotted for the disposition of civil cases ranged from 143 days to 360 days from the date the scheduling order was issued, which in most cases was after the answer had been filed.

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[1] The Administrative Office in its comments states that in a study entitled "Court Management Study" the Senate Committee on the District of Columbia recommended that pretrial conferences be held by judges. According to the study this expedites the trial and explores early settlement.

--In another district, each judge had developed his/her own management procedures and practices for handling and processing civil cases. These various practices ranged from issuing a standard order setting a trial date 6 months from the date the case was filed, to setting a trial date after the final pretrial conference. The important point is that all judges established time frames for the civil process.

In the other districts, the judges' practices regarding the early establishment of time frames varied substantially. In these districts, judges who established early case time frames and deadlines were in the minority. Judges who did not set case time frames and deadlines believed that this could not be done because of inadequate judicial resources and court congestion. Further, certain judges believed the attorneys should control the pace of litigation, not them.

Although the establishment of time frames is not in and of itself a cure-all for alleviating a court's backlog, what it does is (1) establish the court's control of the case, (2) break the case into manageable components, and (3) provide realistic time frames for the attorneys to meet. The early establishment of such time frames is necessary to avoid a severe backlog. However, to realize the full impact of establishing time frames, the court must incorporate in its case management system a means of monitoring and enforcing the attorneys' compliance with its time frames. If the courts do not actively monitor compliance with the time frames, they become virtually meaningless.

Need to monitor and enforce time frames

The monitoring and enforcement of time frames by the court is essential to expedite the civil process. Like the establishment of time frames, the monitoring and enforcement practices of the nine courts visited varied substantially among courts and judges. Courts which consistently monitored and enforced time frames tended to have lower backlogs than courts where case monitoring was either ineffectively used or not practiced at all. Similarly, within each court, judges who effectively practiced case management by setting up a system which incorporated case time frames and who monitored and enforced the time frames were able to move their cases more expeditiously. As a result, these judges had a lower pending caseload.

Those courts with good case monitoring practices reviewed the status of each case at the various steps in the civil process. This function was performed by personnel from the clerks' offices who systematically reviewed the pending civil docket to identify slow moving cases requiring the court's intervention. This task was performed by tracking, via docket cards, the specific time frames for each case and notifying the attorneys of the court's concern where time frames on pleadings and motions were not being complied with.

These monitoring practices:

--Insured that court-established time frames were maintained so slow moving cases would not disrupt the court calendar.

--Insured that cases not actively litigated were dismissed for want of prosecution before consuming an unwarranted amount of court personnel time.

--Increased the opportunities for early case settlement.

Court enforcement of case time frames and local rules can be accomplished by court-imposed sanctions and fines, denial of continuances, or directly or indirectly applied court pressure. The courts' practices regarding time frame enforcement varied among the districts visited and within courts. In courts which exercised strong judicial control, judges imposed monetary sanctions on attorneys for unreasonable delaying tactics. Further, rather than automatically granting case continuances, these courts required formal requests and justification for time extensions. In addition, judges and court personnel constantly reminded the attorneys of the firmness of the time frames, especially the trial date which most judges considered crucial to early case settlement.

On the basis of case data and interviews, we concluded that courts which effectively enforced case time frames minimized their backlog. The following table illustrates the effectiveness that good case management can have on the number of cases pending 1 year or longer.

Degree to which courts practiced case management	Percent of judges practicing effective case management	Cases pending as of June 30, 1979	Number of cases pending 1 year or longer as of June 30, 1979
Very Great			
Court A	100	1,698	274
Great			
Court B	50	1,679	672
Court C	43	2,432	805
Moderate			
Court D	25	1,846	1,003
Court E	25	3,214	1,291
Court F	25	2,712	1,463
Court G	23	4,380	1,638
Small			
a/Court H	0	3,862	2,958
b/Court I	0	5,576	3,697

Not only did an effectively enforced case management system affect the courts' pending caseloads, it also affected how expeditiously the courts processed their civil cases. For cases that took longer than a year to terminate, courts that practiced sound case management spent less time for the civil process.

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a/ When cases for this court were sampled, the universe of pending cases was reduced to exclude a large number of black lung cases. According to the court these cases were not being actively litigated due to their large numbers and the lack of judges. Including these cases in the universe would have provided an unfair picture of the court's operations.

b/ The universe of pending cases for this court was reduced to exclude a large number of Interstate Commerce Commision rate cases. According to the court these cases were not being actively litigated due to their large number and uniqueness. Including these cases in the universe would have provided an unfair picture of the court's operations.

Courts which effectively enforced a case management system were able to control the amount of time attorneys devoted to the various steps in the civil process, especially the discovery phase. This phase is regarded by the courts as the portion most difficult to control, and yet, one which is most subject to attorney delay and abuse. In one district which lost any semblance of court control, 95 percent of its backlogged cases had not completed the discovery stage. Although certain courts have attempted to limit discovery activity by local rules which restrict the number of interrogatories, enforcement of these rules is still uncertain, since these restrictions are subject to varying court personnel interpretation. As a result, courts which effectively contained the discovery activity managed to terminate cases faster.

The following table illustrates the impact effectively enforced case management practices had on the processing of civil cases which took more than 1 year to terminate. As one can observe, a wide disparity existed in the nine courts for completing the civil process. For example, cases were disposed of in a median time of 462 days in one district and in a median time of 847 days in another district.

Degree to which courts practiced case management	Percent of judges practicing effective case management	Median number of days from date of filing to completion or closure
Very Great		
Court A	100	462
Great		
Court B	50	519
Court C	43	470
Moderate		
Court D	25	792
Court E	25	521
Court F	25	813
Court G	23	591
Small		
Court H	0	845
Court I	0	847

Judges who implemented case management systems had the lowest pending civil caseloads. Because certain courts did not track individual judge's case closings and pending caseloads, we were unable to develop a complete profile for judges within every district. However, the following chart illustrates the wide variance that existed within courts regardless of the court's case management philosophy.

Court and judge	Extent of case management practices	Pending caseload as of June 30, 1979	Number of cases closed during year ending June 30, 1979
Court D			
Judge 1	very great	336	357
Judge 2	moderate	471	310
Judge 3	small	517	238
Court E			
Judge 1	very great	249	400
Judge 2	moderate	379	297
Judge 3	small	528	265
Court G			
Judge 1	very great	169	495
Judge 2	moderate	261	319
Judge 3	small	394	241

It is clear that one of the keys to minimizing civil case backlog and expediting the civil process is the development and enforcement of a case management system.

BETTER USE OF COURT RESOURCES CAN EASE CIVIL CASE BACKLOG

Increased utilization of court resources is essential to the elimination of civil case backlogs. The courts visited could reduce their backlog of civil cases if they increased the use of the clerks' offices and magistrates. Increased use of such resources would relieve judges of many administrative and less important judicial functions. Ultimately, this would lead to more timely disposition of all matters before the court.

Clerks are not fully utilized

The clerk's office in each court can provide a valuable service to the judges and magistrates by administering their case management and docket control systems. The clerk's office can assign cases to the judges, maintain case files and exhibits, record key case information on docket cards, provide monthly reports of case activity, monitor all cases on a systematic basis, and insure deadlines are met. Because each clerk's office is organized differently, depending on the local tradition and judges' preferences, the range of services provided and who performs these services vary.

The courts with the least backlog more actively involved the clerks' offices in administering case management and docket control systems than did the courts with the higher case backlogs. The following describes how three districts with the least backlog used the clerk's office to expedite the disposition of civil cases.

--In one district, the clerks assisted in case assignment, case scheduling, and the systematic monitoring of pending cases. If the attorney in a case failed to comply with established time frames or did not actively litigate, the clerk's office informed the judge and set up meetings to determine why the time frame was not met.

--In another district, the clerk's office tried to insure an equitable assignment of cases to judges by accounting for such factors as case type, pending caseloads, and time spent in trial. Further, it provided monthly caseload activity reports by judge of cases pending, closed, and assigned, along with the prior year's caseload figures. Also, depending on the judge, personnel from the clerk's office scheduled cases, issued scheduling orders, monitored pending cases on a periodic basis, and reminded attorneys of the court's deadlines.

--In the third district, the clerk's office administered the case assignment system to insure an equitable distribution of cases to the judges. Depending on the judge, personnel from the clerk's office performed

> various duties. Normally, they were involved in scheduling and monitoring cases for pretrial conferences, assisting and preparing the trial calendars, and actively monitoring cases. Two judges encouraged the clerk's personnel to maintain close contact with attorneys to keep abreast of settlement possibilities. The judges credit this approach with the settlement of many cases.

The use of the clerks' offices in these courts reduced the administrative burdens on judges and helped maintain the pace of civil litigation. Further, the judges in these courts agreed that the clerks' offices were vital to the expeditious disposition of civil cases.

In the courts with large backlogs, the clerks' offices were minimally involved in administering case management and docket control systems. For example, in one court with a backlog problem, the clerk's office provided little or no management information to judges and did not provide any assistance to judges in monitoring or managing their caseloads. Each judge was left to individually set his own calendar and keep abreast of case flow. In another district with a high case backlog, only one judge used the clerk's office to perform case management and docket control activities.

All the courts suffered from the lack of a uniform and centrally administered case management system. In lieu of a uniform case management system, each judge who had a system implemented it differently. Consequently, the existence of many diverse case management systems limited the clerk's office's ability to (1) establish uniform procedures and forms to streamline case processing and (2) reassign personnel from one judge to another when needed, because each judge had a different system, and generally only one individual in the clerk's office was familiar with each system. Further, some judges, although case management oriented, did not assign case management and docket control services to the clerk's office. Rather, they handled these duties by themselves, or their law clerks or secretaries handled them. This practice placed unnecessary administrative demands on the judge and his personal staff.

If a court is to operate effectively and reduce its backlog, then the judges within the court must agree on how to best utilize the personnel in the clerk's office. Clerks can relieve the administrative burden on judges, administer the court's case management and docket control system, and insure the court's litigative pace is maintained. To improve the operations of the court, the judges should (1) adopt uniform case management and docket control procedures and (2) assign the administration of such a system to the clerk's office. The clerk's office and the judges then can work in tandem to enforce the requirements of such a system. Utilization of the clerk's office and its personnel in such a fashion can help the court operate more efficiently and effectively and should help reduce the court's backlog.

Magistrates are not being fully utilized

The courts can improve their operations by making better use of magistrates. The magistrates are authorized to handle, within limitations, certain criminal and civil matters. The Federal Magistrate Act of 1979 was enacted on October 10, 1979, to expand the magistrates' authority to dispose of certain minor criminal cases and to dispose of civil cases upon the courts' specific designation and the litigants' consent. Although the legislation's intent was to provide additional judicial resource flexibility for district courts, certain districts, because of judges' practices, have not fully utilized their magistrates.

Magistrates are authorized to handle a wide variety of duties which provide the court with greater flexibility. Some of these duties include supervising the criminal and civil calendars; handling pretrial proceedings, including discovery conferences and settlement conferences; determining nondispositive motions; and issuing subpoenas, writs of habeas corpus, or other orders necessary to obtain needed witnesses and evidence. Although the magistrates have authority to substantially assist the court, the courts visited generally did not effectively use them. In five of the nine courts visited, some judges were unwilling to assign civil case duties to magistrates. These practices limited the court from doing all it could to minimize the civil backlog. The following are examples of such practices:

--In one district with a backlog problem, only two of nine judges used the magistrates to handle substantive matters, such as pretrial conferences.

--In one district with a backlog problem, the magistrates had not been certified to handle civil cases as authorized by the Federal Magistrate Act of 1979.

--In another district, the magistrates were limited to handling primarily administrative cases involving a review of case files and suggesting recommendations to the judges. This court had not used its magistrates to handle pretrial proceedings, settlement conferences, or motions to any great extent. Several judges in this court did not believe magistrates foster timelier disposition of civil cases.

--Even in a district which overall had a low civil case backlog, the magistrates were not being used to their full potential. In one of the court's divisions that had the highest number of pending cases, the judges rarely delegated any portion of a civil case to the magistrates.

Magistrates were not used because judges said they (1) believed magistrates do not expedite the disposition of civil cases because their decisions can be appealed to the court, (2) wanted full control of all cases, and (3) believed the opportunities for settlement were greater if they presided over all conferences. Unless the magistrates are utilized as authorized by the act, the act's potential for expediting and improving on court operations will be impossible to measure.

LACK OF JUDICIAL MANPOWER HAS CONTRIBUTED TO THE CIVIL BACKLOG

The lack of an adequate complement of judges has contributed to a backlog of civil cases. Courts experienced a shortage of judges when judges became ill for long periods of time and when judges became involved in cases that consumed a great deal of time.

Until the passage of the Omnibus Judgeship Act of 1978 (P.L. 95-486, 92 Stat. 1629), the number of authorized judgeships had not increased since 1970. As of July 1, 1970, the number of authorized judgeships for all district courts was

399. The authorized judgeships for the 9 courts visited ranged from 2.5 to 16. Upon passage of the act, the authorized judgeships systemwide increased by 117, thereby providing a new authorized strength for the 9 courts visited, ranging from 5 to 17. During this span of 9 years the number of civil filings increased from 87,321 to 133,770. In one court visited, the lack of judges contributed significantly to the backlog problem. The pending cases in this particular district increased from 739 as of June 30, 1970, to 3,854 as of June 30, 1978. During this period the court was authorized the resource equivalent of two and one-half judges. The half-judge authorization represented a judge who split his time between two different district courts. Compounding the problem, the judges had to divide their time between eight geographical locations. The inability of the judges to handle the increased filings because of their volume, compounded by the inefficiencies caused by the multiple locations of the courts, played a significant role in the court's backlog problems. Under the new judgeship act this court now has a total authorization of five and one-half judges.

Court resource problems caused by judges becoming ill or involved in time-consuming cases occurred in five of the nine courts visited and affected the courts' ability to keep their caseloads current. For example:

- --Two courts visited handled school desegregation cases that required the full attention of a judge in each court. In one court a major portion of a judge's time was devoted to one case for 5 years. Furthermore, the court continued to assign cases to the judge even though he was unable to handle them. In the other court, a judge had been handling a desegregation case for 4 years while still being assigned additional cases.
- --In another court a judge was involved in a bankruptcy case that required his full attention for 18 months. During this period, the judge was still being assigned cases.
- --An airplane accident case required another judge's full attention for 7 months while he continued to be assigned cases.

- --In several courts there were occasions when judges became ill for long periods of time and the court was left without a full complement of judges. For example, two courts experienced the equivalent of 32 and 41 vacant judgeship months, respectively, over a 2-year period.

CONCLUSIONS

An adequate complement of judges is essential if a court is to dispose of its cases in a timely manner. However, the problem of backlogs cannot be solved solely by an increase in the number of judges. It must be recognized that processing a large volume of cases requires efficient court administration.

The key element we identified that expedites the civil process is a strong case management system that includes:

- --Uniform case management procedures.
- --Early definition of time frames for each case.
- --A monitoring system for identifying cases that are not adhering to predetermined time frames and not being actively litigated.
- --Enforcement of the court's time frames through the use of sanctions.

By establishing a case management system, the court assumes responsibility for insuring that a case is actively litigated.

The development and enforcement of a case management system, in conjunction with the increased utilization of court resources--magistrates' and the clerks' offices--is essential to the elimination of the civil case backlog. The Judiciary needs to insure that the resources it has are effectively used throughout the judicial system.

RECOMMENDATIONS TO THE JUDICIAL CONFERENCE

To improve the operations of the Federal district courts and to reduce the backlog of civil cases, the Judicial Conference should:

- --Develop a proposed amendment to the Federal Rules of Civil Procedure to include maximum time frames for the various steps in the civil process and require each court to establish time frames within these limits. The Federal Rules also should authorize a judge to waive the time limits for good cause shown, such as case complexity, and to establish alternate time frames where appropriate.

- --Encourage the district courts to better utilize their clerks' offices in the administration of the courts, particularly for case management and docket control systems.

- --Encourage the district courts to make greater use of the magistrates as provided in the Federal Magistrate Act of 1979.

CHAPTER 3

AGENCY COMMENTS AND OUR EVALUATION

The Administrative Office of the U.S. Courts, the chief judges in 8 of the 9 Federal district courts visited, and the Department of Justice commented on this report. (See apps. I through X.) One chief judge offered no comments. On the whole there was agreement for effective case management. Some enthusiastically supported our recommendations, while others expressed a number of concerns or did not directly address our recommendations. The areas of agreement and disagreement are discussed in the following sections.

CASE MANAGEMENT AND NEED TO MODIFY THE FEDERAL RULES OF CIVIL PROCEDURE

While agreeing with the need for effective case management, the Administrative Office and one chief judge disagreed with the need to modify the Federal Rules to establish maximum time frames for the various steps in the civil process as the report recommends. The Administrative Office is of the opinion that maximum time frames can not be set for all types of civil cases, especially complex cases or those involving numerous litigants. The Administrative Office further believes that modifying the Federal Rules is not the appropriate means to reduce civil case backlog. The chief judge believes that such a change would lead to a "speedy trial act" for civil cases similar to the Speedy Trial Act for criminal cases and might speed up terminations but not necessarily indicate justice was done.

Contrary to the views of the Administrative Office, the Federal Judicial Center's 1977 report, the majority of chief judges of the nine courts visited, and the Department of Justice all agree that flexible time frames can be established for all types of cases, including complex cases. We appreciate the Office's well founded concern that there will be occasions when cases will not be able to meet predetermined time frames. In recognition of this, our recommendation contemplates that the time frames would be flexible. For example, judges should be authorized to waive time frames for good cause shown, such as case complexity, and establish alternate time frames when appropriate. As for modifying the Federal Rules of Civil Procedure, one judge summarized the report's recommendation by stating that "This proposal strikes me as being the logical approach in the process of bringing about procedural change to achieve uniformity among the courts and their judges in prescribing time frames for the processing of civil cases." Another chief judge said "Such time limitations are presently not established by the Federal Rules and are instead the subject of myriad local rules throughout the country. The suggested uniform time frames will undoubtedly serve to expedite the civil process." The Department of Justice supported the recommendation by saying "It is apparent that amendments to the Federal Rules of Civil Procedure will probably produce improvements in the efficiency of the civil process, and at the very least will send a message to the Judiciary that greater efficiency is a goal to be emphasized." The establishment of time frames for the various steps in the civil process is not as impractical as the Administrative Office seems to suggest.

The chief judge who was opposed to modifying the Federal Rules did so because he believes such action will limit the courts' flexibility to adjust to changing workloads as the Speedy Trial Act did. Although our recommendation proposes the establishment of time frames, it provides flexibility to enable litigants and courts to accommodate themselves as problems arise. The recommendation states that a judge should be allowed to waive time limits for good cause, such as case complexity.

Another issue raised by this chief judge was that although coerced uniformity might speed up terminations it would not necessarily indicate justice was done. However, we believe our recommendation would avoid the pitfalls of coerced uniformity by providing the judges with sufficient latitude to administer time frames consistent with the requirements of each case. What the report also suggests and the judge agrees with is continuous contact by the court with the attorneys and litigants as one component of good case management. The judge believes that the Federal Rules should not be modified to accomplish such contact. This of course is true if a given court opts to manage its calendar in such a manner as to assure regular contact between the court, attorneys, and litigants. However, we believe the establishment of flexible time frames would be a greater assurance that such contact is occurring in courts throughout the judicial system. It should be noted that the court in question has local rules that insures this contact, and by no means do the lawyers we interviewed who practiced before the court believe they are being coerced.

FAILURE TO SUBSTANTIATE BENEFITS OF CASE MANAGEMENT SYSTEM

The Administrative Office endorsed the report's recommendation regarding effective delegation of strong case management to the clerks of courts. The Administrative Office, however, even though accepting the recommendation on case management, stated that our conclusion should more clearly substantiate the benefits of a case management system. In our opinion, the report clearly demonstrates that a case management system reduces the time needed to process civil cases. On page 17 we demonstrated that courts which had proven case case management systems were able to move their cases much faster than courts that did not. Further, as shown on page 18, the report demonstrates that judges who had effective case management systems were able to process civil cases much faster than judges who were without such a system.

In addition, the chief judges for the courts that commented on our draft report, as well as the Justice Department, agreed with our conclusion and recommendation concerning the merits of a case management system. In September 1977 the Federal Judicial Center issued a report which further supported our recommendation. This report concluded that those courts that practiced case management disposed of civil cases in less time than those district courts that did not.

We believe we have demonstrated that case management systems can reduce the time it takes to dispose of civil cases.

CASE COMPLEXITY

One chief judge suggested that the statistics on cases pending 1 year or longer would be more meaningful if they differentiated between complex and noncomplex cases. He recognized that many cases can be disposed of quickly but observed in his district that complex cases make up a higher proportion of the cases pending 1 year or longer. Using the judge's definition of complex cases--patent, trademark, multi-defendant securities, and aircraft cases--we determined that such cases represented only 27 percent or less of the cases pending a year or longer for any of the courts visited.

The report does not recommend or propose that any case, including complex cases, be disposed of in 1 year or less. The report's recommendation concerning the establishment of time frames specifically provides for a provision allowing for a waiver requirement for complex cases and the establishment of alternate time frames. To clarify the issue further, the maximum time frames recommended can be whatever the Judicial Conference determines is reasonable. In addition to our analysis the Federal Judicial Center's 1977 report states that courts that employed case management systems disposed of complex cases more quickly than courts that did not.

The chief judge was also concerned because the chart on page 18 failed to relate the figures to case complexity. The chart in question illustrates the relationship between effective case management and the number of cases pending and closed for the statistical year ending June 30, 1979, per judge for certain courts. What the report failed to highlight was that the judges in the three courts were assigned cases on the basis of a lottery system, thereby diminishing the likelihood that any one judge would be overburdened with an inequitable share of complex cases.

SPEEDY TRIAL ACT AFFECTS BACKLOG

Four of the chief judges attributed the civil backlog problem to the provisions of the Speedy Trial Act which require the bringing of criminal cases to trial within 100 days. Although the act has affected the courts, the severity of the impact depends on how well the courts managed their caseloads and utilized their resources. Two of the four judges stated that criminal cases are becoming more complex and thus requiring more of their time. Because of this we believe it is even more imperative that judges become familiar with and adopt a case management system to help them ease the burden of civil cases and to insure the timely processing of civil cases.

A study dated April 15, 1980, conducted for the Department of Justice by a private contractor, concluded that courts that disposed of civil cases expeditously prior to the act continued to do so after the act's passage. The study attributed this to long-standing mechanisms already in place. We reached the same conclusion in the courts visited; that is, courts and judges that employed case management and utilized their resources processed civil cases more expeditiously than those that did not.

It should be recognized that 90 percent of all civil cases are settled without going to trial and that establishing time frames for the various steps in the civil process, especially firm trial dates, could lead to early settlements. This eliminates the need for a trial and reduces the time a judge spends on a case. A judge's involvement in a case can be further minimized if the clerks and magistrates were allowed to implement and monitor the case management system.

INNOVATIVE TECHNIQUES

In commenting on the draft report, the Administrative Office stated that improved case management techniques alone will not address the backlog problem. It said that one must find new ways through which litigation may be resolved without the necessity for a trial. It suggested such alternatives as eliminating diversity cases from Federal jurisdiction, new methods for handling prisoner petitions, and expansion of arbitration procedures. The Office also cited innovative calendar management techniques and trial setting practices as steps some courts have taken to ease their workloads.

We agree that improvements in court operations other than case management would help ease the burden on the courts. However, it still remains that reducing the number of matters reaching the courts or making administrative improvements in no way diminishes the need for the courts to employ effective case management systems.

The other alternatives to reduce the workload of the courts, while viable options, have either met resistance or are still in the experimental stage. The issue of removing diversity cases from Federal district courts has been debated within the Congress for many years, and no resolution has come about as of this date. The issue of prisoner petitions is also controversial because prisoners' civil rights are protected by Federal consitutional law. (See p. 9 of the report.) Although these legal limitations presently exist, the options suggested would assist in relieving the courts' workload. The third alternative suggested by the Administrative Office deals with the expansion of arbitration procedures. However, the Administrative Office recognizes that this is an experimental project and has only been established in three district courts. The Administrative Office must recognize that the options it presents could be fruitless if additional efforts are not directed towards improving the management of the Federal district courts.

SHOULD SLOW MOVING CASES BE DISMISSED?

The Administrative Office criticizes the report for not sufficiently emphasizing dismissal for lack of prosecution as a management tool. On the other hand, a judge expressed concern that the court cannot always give lawyers firm trial dates, which possibly could increase litigation costs if a trial date was established and then cancelled. The chief judge also stated that it is easy to be ruthless with lawyers at the expense of litigants by dismissing cases for failure to comply with the court's time frames.

The suggestion by the Administrative Office to dismiss cases for lack of prosecutive action is not the best way to address the causes of civil case backlog. The Administrative Office needs to fully recognize the benefits that can be gained by having a sound case management system. For example, on page 14 of the report, we discussed in detail an essential component of any case management system. That component is a case monitoring system to insure that time frames for the various stages of the civil process are met. The performance of this task not only reduces the time needed to process civil cases but also provides the litigants with the assurance that their case is being actively processed by their attorneys. Also, the establishment of firm dates--especially trial dates--should promote out of court settlements. In view of this, we believe the utility of dismissal for lack of prosecution should be placed in proper perspective and should not be confused with the benefits that can be derived from sound case management. Dismissal is a remedy or a sanction that generally comes into play only when a case lacks prosecutive merit or the litigants fail to adhere, without justification, to the time frames or other requirements applicable to the case involved.

The concerns of the chief judge are addressed by the report's recommendation which allows flexibility and yet does not imply strict conformance to required time frames. The report's recommendation provides flexibility to avoid arbitrarily dismissing cases and to ensure litigants do not incur unnecessary litigative cost.

There are two beneficial aspects of a case management system: (1) it brings the lawyers together to discuss the issues which may lead to settlement and (2) the litigants can be assured that their case is being actively litigated.

To the extent courts practice sound case management and litigants become aware of and adhere to the courts management requirements, it clearly will not be necessary to dismiss cases for lack of prosecution. In fact, what may happen is that cases may be settled out of court or merely dropped by the litigants themselves if the soundness of the case is in question.

SAMPLE SIZE QUESTIONED

The Administrative Office said that our sample was not representative because we visited less than 10 percent of the Federal district courts. We agree that we visited less than 10 percent of all district courts; however, our objectives were to determine whether and why a backlog existed and what could be done to alleviate it. As a result, we identified that 60 percent of all cases pending 1 year or longer, as of June 30, 1979, were concentrated in 20 of the 95 district courts. Therefore, we selected 6 of the 20 for detailed review. These six courts accounted for 40 percent of all cases pending 1 year or longer. For further details on scope and methodology, see chapter 4.

By concentrating our review in the six courts that had a severe backlog problem, we believe we were better able to identify the factors contributing to the problem. For contrast purposes, we selected three district courts that were not experiencing a severe backlog problem. In our opinion, if we had taken a random sample of the 95 district courts, we may have concluded that there was no civil case backlog problem, which we are sure that the Administrative Office would have considered inaccurate. Therefore, we believe by identifying the courts that accounted for 60 percent of the problem, and then sampling 30 percent of these district courts, we were able to more thoroughly analyze what should be done to improve the management of civil cases.

NEED FOR ADDITIONAL RESOURCES

Four of the chief judges commented that there is a need within the courts for additional resources, including judges, court personnel, and magistrates to handle their increasing demands. On pages 22 to 24 the report discusses in detail the impact the lack of judicial manpower has had on civil case backlog. However, the question that must be addressed is whether the courts are using their present resources effectively. Once case management techniques are adopted and court resources are effectively used, the courts will be in a much better position to appropriately determine the manpower needs of the courts.

CHAPTER 4

SCOPE OF REVIEW AND METHODOLOGY

We reviewed the issue of civil case backlog in Federal district courts because of the concerns of the Congress, the Department of Justice, the Judiciary, and the public. We initiated our review to determine whether and why a backlog exists, and what can be done to alleviate or minimize the backlog.

SELECTION OF LOCATIONS

For the purpose of this review, it was necessary to determine what constitutes a backlog in the Federal district courts. In the absence of a definition, we defined a civil case as being backlogged as any case pending 1 year or longer from the date of filing. Based on this definition, data was obtained from the Administrative Office of the U.S. Courts on all cases pending 1 year or longer as of June 30, 1979, in each district court. The cases were aged by 1 year, 2 years, and 3 years or older.

Our analysis showed that 60 percent of the cases pending 1 year or longer were concentrated in 20 of the 95 district courts. Six of the 20 courts were selected for review. All 6 courts were among the 20 with the largest number of cases in the categories 3 years or older and 2 to 3 years or older. Five of the 6 were ranked among the 20 in the 1-year category. To draw a contrast we also selected 3 courts that were not among the 20 courts for any of the 3 categories. In addition to selecting the courts because of their rankings, an additional factor was the availability of our staff to perform the work. The chart below identifies where the courts reviewed ranked among the 95 Federal district courts.

District court	Ranking 1-2 yrs.	2-3 yrs.	3 yrs.-over	Overall
A	55	41	51	52
B	34	31	48	36
C	26	32	33	30
D	30	19	18	20
E	16	18	17	16
F	14	12	13	14
G	11	15	9	11
H	9	2	2	4
I	2	1	1	1

The principal field work was performed between December 1979 and June 1980 and included a detailed review of both pending and closed civil cases, 1 year or older, at nine Federal district courts.

SELECTION OF SAMPLE

The Administrative Office of the U.S. Courts provided us with a list of cases pending 1 year or longer as of June 30, 1979, and those cases over 1 year old that were terminated during statistical year 1979 for the nine courts reviewed. From this universe we randomly sampled both pending and closed cases. The following is the universe and our sample size.

District court	Pending cases: 1 year or longer	Pending cases: Sample size	Closed cases: 1 year or longer	Closed cases: Sample size
A	274	77	191	60
B	672	114	236	58
C	805	101	397	75
D	1,003	127	214	60
a/E	1,291	118	438	93
F	1,463	131	351	95
G	1,638	193	899	130
b/H	2,958	124	172	61
c/I	3,697	222	2,176	150
Total	13,801	1,207	5,074	782

a/ A reduction of sample cases was necessary because a substantial number of the cases pending as of June 30, 1979, were closed between July 1979 and March 1980. Therefore, our original sample would not have accurately depicted the court's current operations.

b/ When cases for this court were sampled, the universe of pending cases was reduced to exclude a large number of black lung cases. According to the court these cases were not being actively litigated due to their large numbers and the lack of judges. Including these cases in the universe would have provided an unfair picture of the court's operations.

c/ The universe of pending cases for this court was reduced to exclude a large number of Interstate Commerce Commission rate cases. According to the court these cases were not being actively litigated due to their large number and uniqueness. Including these cases in the universe would have provided an unfair picture of the court's operations.

For each sample, a detailed case analysis was made to identify at what stage in the civil process the cases were delayed. The case analysis was then used in conjunction with an analysis of each court's operations to identify the practice and procedures that expedited the civil process. At each court visited we interviewed the judges, clerk of the court, courtroom deputies, docket clerks, and the magistrates. Comments from these officials were obtained on such topics as: case management, need for judges, use of magistrates, use of the clerk's office, and their opinion as to why a backlog existed.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR
JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

November 25, 1980

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for the opportunity to comment on the proposed report to Congress entitled "Federal Civil Case Backlog: A Localized Problem Which Can Be Eased." The report's emphasis on improved case management and more efficient use of existing court resources is welcome. The Administrative Office acknowledges these to be among its most important goals, and encourages identification of problems and appropriate remedies in this area. However, it should be noted that the small sample of courts selected for review (less than ten percent of all district courts) are not necessarily representative, and there could be a more detailed and informative statistical analysis of the available data on case processing. Given the extensive developments in court management in recent years, we feel that the draft report's conclusions should be more clearly substantiated, and the recommendations supported by some analysis of proven case management systems. This report comes at a time when the impact of the Omnibus Judgeship Act is only just being felt, and its effects could not be measured in the courts under review. 1/

As the draft report recognizes at pages 9-10, federal jurisdiction is increasing through new legislation. Improved case management techniques alone will not suffice to address the backlog problem. In this context, it is necessary to find new mechanisms through which numerous categories of litigation may be resolved without the necessity for trial in a federal court, or at least under conditions which exhaust settlement mechanisms prior to court involvement. Some of these techniques which should be further explored are:

1. Further consideration of reducing diversity jurisdiction through possible adoption of the recommendations of the American Law Institute. Our 1980 Annual Report reflects that of a total of 154,985 cases were disposed of in the district courts and of these 34,727 were diversity cases. The median time from filing to disposition for the 9,490 diversity cases disposed of by trial was 20 months.

1/Although increased resources will help, there is also a need for many courts to improve the use of resources they do have by better management of their caseloads.

2. Encouragement of administrative screening for state and federal prisoner petitions so that the fact-finding procedures can be exhausted before court involvement. In statistical year 1980, a total of 13,000 prisoner civil rights cases were commenced vis-a-vis 11,783 in fiscal 1979.

3. Expansion of arbitration procedures. The Federal Judicial Center is monitoring a research project on arbitration which was established in three districts by local rule. It would seem minimally that arbitration could be available as an alternative where backlogs are prevalent and severe.

Some innovative calendar management techniques could be discussed, for example putting one or more judges on a criminal case rotation for a period of time, in which they handle all criminal matters arising in that period. The remainder of their calendar assignment would be an identifiable block of time in which civil cases could be scheduled heavily without fear of disruption necessitated by speedy trial concerns, and in which no new criminal matters would be received. This arrangement has worked successfully for judges and for magistrates in several medium-size courts. Another significant omission in the draft report is the absence of discussion on trial-setting practices. The report recognizes that most judges consider a firm trial date crucial to early case settlement, but does not discuss the relative merits of "casestacking" (i.e. setting more than one case for trial on the same date), arrangements of trial calendars, etc. Courts where the Clerk's Office has responsibility for calendar control tend to "stack" cases for trial (based on their perceptions of which cases will settle) somewhat more readily than when judges or their personal staffs set the calendar.

Techniques based on routine case disposition (to achieve what the report refers to as "Uniform Court Procedures" on page 24) may not apply to protracted or complex litigation, multidistrict litigation, or large class actions. While some of the suggestions for establishing deadlines and time frames in the report are provocative, they simply do not apply to highly complex cases or those with numerous parties. This should be acknowledged in the report and cross-reference made to the Manual on Complex Litigation and the rules of the Multidistrict Litigation Panel. For similar reasons we question the proposal to modify the Federal Rules of Civil Procedure to include maximum time frames for the various steps in the civil process, subject to waiver (page 24). The Federal Rules are calculated to achieve uniformity in those procedures capable of uniform application. It is not realistic to include in them maximum time limits to fit the conditions of every case whether it is a large antitrust case, involving an entire industry on the one hand, or a pro se prisoner petition on the other. Guidelines appropriate to various categories of litigation might be more appropriately advocated if local procedures of more uniform character are needed, but such guidelines should not treat all federal civil cases as fungible or even closely related. This can be readily demonstrated by reference to table 37 (cases pending three years or more) in our 1980 Annual Report to the Director. There is such a vast difference in the kinds of litigation reflected in that table (copy enclosed) that no rigid time frame could be applied. 1/However, guidelines could establish some reasonable norms in processing certain categories of cases, which would be a more flexible approach to the enormously varying conditions in 95 district courts and the different kinds of litigation within any given court.

The draft report does not sufficiently emphasize the utility of dismissal for lack of prosecution as a case management tool. It is omitted from the table of local rules which expedite the civil process (page 12) although the majority of courts have such a rule, and it is mentioned only briefly on page 15, with no specific time interval recommended. 2/The report should advocate a systematic screening of inactive cases which would provide for dismissal without prejudice after six months, or no longer than one year. It would be interesting to learn the review team's findings in the cases which they examined, i.e. what percentage of cases over one year old had no docketed entries for over six months or over one year. 3/

Regarding greater use of magistrates, the draft report recommends that the Judicial Conference encourage the district courts in this endeavor. It has been the strong and persistent policy of the Judicial Conference and its Magistrates Committee over the years to encourage maximum utilization of magistrates. This has been done through the jurisdictional checklists, manuals, model rules, sample orders, seminars and workshops, and a variety of reports and memoranda. The statement of page 21 that "the courts generally do not effectively use" magistrates is too broad and misleading. Obviously, certain courts and certain judges use magistrates more effectively than others. Each court must appraise its own needs and preferences. In some districts it is a better application of this resource to use magistrates in certain categories of litigation, such as social security or prisoner cases, than on pretrial and discovery. Although the expanded jurisdiction of the magistrates is relatively new, the courts are gradually developing its potential, and we feel that the sample of courts reviewed by the GAO team is not in fact representative of the district courts as a whole, many of which use magistrates extensively.

A recommendation as to more adequate pretrials was advanced in the Senate document "Court Management Study," Senate Committee on the District of Columbia, 91st Cong. 2d Sess., as reflected in the enclosed extract. 1/This recommended that the judge trying the case should hold a pretrial conference

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1/Enclosure deleted from comments.

2/The local rules illustrated on page 12 of the report are examples that expedite the civil process while maintaining the quality of justice, unlike the rule emphasized by the Administrative Office.

3/Forty percent of the cases pending 1 year or longer had no docket entries for over 6 months.

shortly before the trial date. This not only expedites the trial and explores early settlement, but tends to reduce "court house door" settlements and the consequent waste of a summoned jury panel and staff time. The review team may wish to refer to this recommendation in their report. 1/

With reference to the statistics, we would like to see more discussion regarding the basis of the tables and what the data reflects. (Perhaps appendix tables will be included in the final report.) On page 17, median time intervals are given which reflect days from date of filing to disposition. These medians would be more meaningful if they reflected judge activity; at present they do not distinguish cases in which a judge or magistrate acted, from those which are dismissed by local rule (25 to 35 percent of all dismissals). This distinction would also be valuable in the table on page 18; is credit given equally to all closed cases whether or not there was court action? In court 6, what case types are represented in the 495 cases closed by Judge 1?2/Although outside of the scope of this report, it would be interesting to know whether the dispositions of a "controlled calendar" judge are more frequently appealed than those of a judge who permits the bar to control the pace of litigation. 3/

On page 16, nine district courts are shown with the number of cases pending one year or longer as of June 30, 1979. Tentatively identifying Court I as Massachusetts, Commerce I.C.C. rates cases are missing; this district had a total of 9,613 civil cases pending one year or longer, of which 5,916 were I.C.C. Other "nature of suit" categories appear to have been omitted from the remaining districts, but without seeing the original data we cannot determine if the figures are correct. 1/

On page 3, the section on "Administrative Structure of the Judiciary" notes that there are three levels of judicial administration plus the Administrative Office, but in the discussion judicial councils in the circuits are omitted. These councils were specifically created by the Congress to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 1/

In summary, we endorse the report's recommendations regarding effective delegation of strong case management to the clerks of court, and greater utilization of the magistrates as a resource. We do not feel that modification of the Federal Rules of Civil Procedure is an appropriate means by which to reduce civil backlog; rather, we recommend expansion of mechanisms to resolve civil litigation without trial, and further analysis of innovative and exemplary case management techniques which can be applied to the individual circumstances of each district court.

1/Changes made to report on pages 4,13,16, and 35.

2/At the present time there is no data available to measure judge activity on any particular case. The magistrates participation in cases we reviewed was minimal, because they were filed prior to the passage of the Magistrate Act of 1979. Court G assigns cases to judges on a lottery basis eliminating the possibility that judge 1 was assigned only noncomplex cases.

3/As the Office recognizes, such an undertaking was not within the scope of this report.

Once again, let me thank you for the opportunity to file our comments.

Sincerely yours,

William E. Foley
Director

CHAMBERS OF
EDWARD S. NORTHROP
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
BALTIMORE 21201

November 4, 1980

Mr. William J. Anderson
Director
United States General
Accounting Office
General Government Division
Washington, D. C. 20548

Re: GAO survey — Federal Civil Case Backlog

Dear Mr. Anderson:

I acknowledge receipt of your letter of October 28, 1980, enclosing a copy of your proposed report to Congress on the federal civil case backlog. I sincerely appreciate your courtesy in permitting me to read the draft report before it is finalized.

I would certainly agree with the basic recommendations made in the digest of the report. The recent 1980 Annual Report of the Director of the Administrative Office confirms a major problem of this District, i.e., that our magistrates are required to devote an enormous amount of time to the handling of petty and minor offense cases generated through our Central Violations Bureau on federal enclaves throughout Maryland. I enclose excerpts from that Report which show that magistrates in this District handle a greater volume of these matters than their counterparts in the 25 largest courts in the country.1/ Quite obviously, this minor criminal work seriously limits the amount of time they can expend on the civil caseload of this Court. Without additional magistrate manpower, we would have great difficulty in further utilization of our magistrates.

Moreover, I feel that the current criteria for allocating judicial manpower leaves much to be desired. Enclosed is a tabulation showing the trial time (all in-court time) of the judges of this Court, the District of Columbia, in the other courts which were the subject of the Federal Judicial Center District Court Study, and all other district courts having nine authorized judges.1/ These statistics clearly indicate the enormous amount of time our judges spend on the bench —

1/The enclosure has been deleted.

a factor not taken into account in the allocation of judicial manpower. Case filings are not only inaccurate; they can be manipulated. We have avoided playing the numbers game and have probably suffered as a result. However, I feel that the enclosed tabulation clearly indicates our judges are working at full capacity; and that the pending caseload is increasing, notwithstanding our emphasis on case management and control.

We also suffer from a chronic shortage of clerical personnel because of the numerical criteria used for assigning support personnel, based on existing judgeships. We feel some subjective criteria should be used in this area. With additional clerical personnel, we could increase the amount of time spent by the Clerk's Office on case management and control, without reducing the time spent on docketing procedures which is essential for the maintenance of court records.

I note that on page 2 of your proposed report you speak of the decline in criminal cases. While the sheer numbers of criminal filings has declined, the complexity of these cases certainly has not. Rather, the complexity factor has increased, so that while we have fewer cases, the caseload requires more time, both in the pretrial stage and in the trial stage. Unfortunately, this District has a long history of complex, multi-party criminal litigation which has consumed an enormous amount of the time of our judges and supporting staffs.

I believe the members of your task force collected some data showing that as our criminal pending caseload was reduced by reason of the Speedy Trial Act, the civil pending caseload increased. This trend continues, particularly because this District has a large criminal docket, and our judges must concentrate most of their trial effort and time on their criminal docket, to the detriment of the pending civil docket.

It was a pleasure working with your personnel, and if we can provide any additional information, please do not hesitate to contact us.

Sincerely yours,

Edward S. Northrop

ESN:ps
Enclosures

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK, VIRGINIA 23510

CHAMBERS OF
JOHN A. MACKENZIE
CHIEF JUDGE

November 6, 1980

Mr. William J. Anderson
Director, U. S. General
Accounting Office
Washington, D. C. 20548

Dear Mr. Anderson:

This is in response to your request of October 28 in which you invite comments to your draft report on case management.

For judges of the Eastern District of Virginia, we would make four points:

1. Amendments to the Federal Rules of Civil Procedure to set out specific court administration time for steps in the progress of civil litigation would not be in the best interest of the solution of the problem. We would be establishing a "Speedy Civil Trial" Act, the foolhardiness of which is already manifested in the "Speedy Trial Act" for criminal prosecutions.

2. Flexibility has to be retained without stringent restrictions so that litigants and courts can accommodate themselves to different problems.

3. Continuous contact with the court is the key, whether through status reports or some other scheduled meeting, but this need not be declared by rule.

4. Coerced uniformity might speed up terminations, but it would not necessarily indicate justice done.

Very truly yours,

John A. MacKenzie
Chief Judge, U. S. District Court

JAM/agw

United States District Court
DISTRICT OF ARIZONA
UNITED STATES COURTHOUSE
PHOENIX, ARIZONA 85025

C. A. MUECKE
Chief Judge

November 17, 1980

Mr. William J. Anderson
Director
U.S. General Accounting Office
General Government Division
Washington, D. C. 20548

Dear Mr. Anderson:

Essentially my disagreement with the approach taken by the G.A.O. audit group toward our civil case backlog at the time they made their survey is that they had an opinion, a fixed approach to the problem when they discussed the project with me, which made no allowances for other points of view.

It was their opinion that if only the federal judges would insist on a short and fixed deadline for the preparation of civil cases, like magic all our backlog of cases would have disappeared.

Unfortunately this did not take into account several factors which existed at that time in our district.

The first and foremost was not enough judges. This combined with the provisions of the Speedy Trial Act as this applies and gives priority to criminal cases, caused our backlog.

It is easy to say that we ought to make all lawyers prepare their cases for trial promptly and at a fixed time. This would be absolutely true, if we could then give a prompt trial setting. But if we cannot do that, then cases have to be prepared twice, once to meet a pretrial deadline, and secondly just before the trial which could come one to two to three years later. This only increases the cost of litigation.

We press for pretrial deadlines in all cases, but have allowed some leeway for the reasons I have stated.

It is also easy to be ruthless with lawyers at the expense of litigants. By that I mean a case can be dismissed for failure to comply with the Court's orders, but that does not result in justice for the litigants, it merely gives them a malpractice action against their lawyers. Presently we now have a full complement of judges as a result of the last Omnibus bill, and we are moving our cases to trial and are insisting on deadlines for pretrial preparation. In fact I've instructed our Clerk to give all of our judges (there are now ten of us) a list of cases every three months that are two or more years old as of June 30, 1981, and have encouraged competition between us to reduce our backlog.

Sincerely,

C. A. Muecke

C. A. Muecke, Chief Judge

United States District Court
FOR THE
Eastern District of Kentucky

CHAMBERS OF
BERNARD T. MOYNAHAN, JR.
CHIEF JUDGE

Lexington, Kentucky
November 19, 1980

Mr. William J. Anderson
Director
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Anderson:

I have received your letter of October 28th regarding your proposed report to the Congress concerning civil case backlog in the Federal District Courts.

While your suggestion as to a case management system probably has merit, the adoption of such a plan is absolutely meaningless in resolving the problems of this District within any reasonable period of time. After many accumulated years of judicial vacancies, we now have an adequate complement of Judges but an insurmountable backlog of civil cases.1/These civil cases could be reduced somewhat if the Judges were able to devote any appreciable time to them; however, a new specter has now reared its head; namely, compliance with the Speedy Trial Act.

The emphasis on "white collar crime" with the attendant length and complexity of criminal trials flowing from this area of the law is now requiring that our Judges devote almost all of their attention to the management of the criminal docket. The "chickens" of the Speedy Trial Act have now come home to roost and a case management system will avail nothing because the Judges are still not available to handle the cases.

Until Congress becomes aware of the problems which it creates by the spawning of new legislation and the increasing resort to the Courts by the public, I see no meaningful solution to the matter.

Very truly yours,

Bernard T. Moynahan, Jr.
Chief Judge

BTM:dmw

1/The court's problem is discussed on page 23 of the report. However, if the court is to reduce its backlog it must implement some type of management system.

United States District Court
Post Office and Courthouse Building
Boston, Massachusetts 02109

CHAMBERS OF
ANDREW A. CAFFREY
CHIEF JUDGE

November 24, 1980

Mr. William J. Anderson
Director
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for your letter of October 28 in which you enclosed a proposed draft of your report concerning civil backlog in the federal district courts.

Please be advised that I have read the report which I believe to be carefully prepared and I have no further comment. Thank you for your courtesy in sending it to me.

Sincerely,

Andrew A. Caffrey

AAC/bac

United States District Court
Southern District of Indiana
Indianapolis, Indiana 46204

Chambers of
William E. Steckler
Chief Judge

November 24, 1980

Mr. William J. Anderson
Director, United States General
Accounting Office
Washington, D. C. 20548

Re: Draft of A Proposed Report
Federal Civil Case Backlog: A Localized Problem
Which Can Be Eased.

Dear Mr. Anderson:

Pursuant to your request, I have carefully analyzed the Draft of A Proposed Report. As a general conclusion, I fully agree with the draft and the recommendations contained therein. More specifically, while prescribed time frames will not be a cure-all, I agree that the Federal Rules of Civil Procedure should be modified to include specific time frames for various steps in the civil process, and to require each court to establish time frames within the prescribed limits. I cannot believe, however, that modification of the Rules to that end will be an easy accomplishment. Great resistance at the hands of the organized bar, not to mention much of the judiciary, will make the task difficult to accomplish. Modern discovery practices are a major time-consuming factor in the processing of civil litigation and much of a lawyer's billable time is attributable to discovery work, a source of income not likely to be relinquished without resistance. However, if reasonable time frames, subject to extension for good cause shown, are provided in the modifications of the Federal Rules of Civil Procedure, the organized bar, in my opinion, will show less resistance to the proposed rule change. In any event, until adoption of uniform procedures for the early definition of time frames for processing civil litigation is required of the district courts, this one key element of a strong case management system will not be accepted generally by the bench and bar.

To improve the operations of the federal district courts and to reduce the backlog of civil cases, the draft report recommends that the Judicial Conference should modify the Federal Rules of Civil Procedure to include maximum time frames for various steps in the civil process and require each court to establish time frames within those limits.

Also, that the Federal Rules should allow a judge to waive the time limits because of case complexity or for good cause shown but that the waiver should be adequately justified. This proposal strikes me as being the logical approach in the process of bringing about the procedural change to achieve uniformity among the courts and their judges in prescribing time frames for the processing of civil cases.

A second recommendation in the report is that the district courts should better utilize the clerks' offices in the administration of the courts; in particular, that the clerks should be responsible for the administration of the courts' case management and docket control systems. In general, I agree with this recommendation. However, until the clerks' offices are staffed with a complement of paralegals, or with staff attorneys, whose duty would be to screen the cases and invoke effective monitoring, I question whether the clerks' staffs as presently staffed have either the time or competence to exercise full responsibility for the courts' case management and docket control systems. In this connection, it is my view that the optimum achievement is to be gained through the so-called "team approach," that is, by the courtroom deputy clerk, the docket clerk, the judge's law clerks, his secretary, and the judge himself being involved in the calendar control process. 1/

The draft report speaks of having the judges adopt uniform case management and docket control procedures, and to assign the administration of such a system to the clerk's office, and that then the clerk's office and the judges work in tandem to enforce the system. This, to a great extent, is the practice followed in the Southern District of Indiana. However, we have found that it is preferable to have one person in the clerk's office assigned to a judge as a courtroom deputy clerk to be the person responsible for case management and calendaring the cases. This individual in the clerk's office is the person directly responsible to the judge and his staff in keeping open the line of communication between the judge and his staff and the attorneys in the cases. The direct relationship and communication between the judge and his staff and the clerk's office through the courtroom deputy clerk has been found to be the most effective means of coordinating the judge's efforts with those of the clerk's office and the members of the bar. Thus, the role of the courtroom deputy clerk takes on added importance in the adjudicative processes.

1/Such an approach can only work if the court as a whole adopts a uniform case management system.

Basically, I disagree with the definition of a backlog as being those cases which have been pending in the court for one year or more after being filed. I am inclined to the view expressed by the officials in the Administrative Office defining a backlog as cases where the parties are ready to go to trial but the court is unable to try the cases. The one year criterion appears to be an arbitrary standard, one that is suitable for the purpose of the General Accounting Office's staff in conducting its study and making its report of its findings in respect to the lack of uniformity among the courts in adopting and applying time frames in processing civil cases, but beyond that purpose the one year criterion fails to take into account the contributions of senior judgeships in those districts having no serious backlog, where senior judges are actively contributing their services in order to cope with the caseload pressures in their district.1/ The Administrative Office in reporting the average caseload per authorized judgeship does not count the senior judgeships in arriving at the average caseload per judgeship reported. This is a factor that should not be overlooked when comparing the experience of one district court with another.

I agree fully with that part of the draft recommending that the Judicial Conference should encourage the district courts to make greater use of the magistrates as provided in the Federal Magistrate Act of 1979. Indeed, the Southern District of Indiana has three full-time magistrates whose services are fully and completely utilized and without whose services our district would be suffering an even greater backlog than it is. Why any court would not make full use of the magistrates' services is incomprehensible to a judge who has had as good an experience as our court has had.

There are numerous other factors which have contributed to the civil case load and backlog in the federal district courts which cannot be classified as a localized problem. These, for example, include the increased lawyer population and the greater accessibility to the courts as the Congress has provided through the numerous legislative enactments during the last ten to fifteen years. These factors, of course, justify the courts' taking a new look at their present procedures. If by adopting time frames within which to process civil litigation a part of the increased pressure may be met in a more satisfactory manner than we are able to accomplish today, then that should be done.

1/For the most part senior judges did not significantly contribute to reducing the backlog in the courts visited.

It was a pleasure to work with the members of your staff -- Willie Bailey, Tim Whalen, and Deborah Smith. I predict that real benefits will come from the results of your study.

Cordially,

William E. Steckler

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
LOS ANGELES CALIFORNIA 90012

CHAMBERS OF
A. ANDREW HAUK
CHIEF UNITED STATES DISTRICT JUDGE

TELEPHONE
[illegible]-5272

November 26, 1980

William J. Anderson, Director
United States General Accounting Office
Washington, D.C. 20548

Dear Sir -

Thank you for your letter of October 28, 1980, and for allowing us the opportunity to review the Draft Report to Congress concerning civil case backlogs in Federal District Courts and extending the opportunity to comment on the same until December 10, 1980.

First, let me state that the Judges of this Court are in general agreement that in order to promptly dispose of civil litigation, the Court and not the litigants must control the progress of the litigation. To this end, the Court has had a rule of longstanding that any action which affects the progress of the litigation must be approved by the Judge assigned to the case. We have also had rules of longstanding governing our motions practice, discovery and pre-trial scheduling. With respect to our motions practice and pre-trial schedules, we have recently modified our rules with a view to establishing more uniformity in the Court and tightening up on the control of these phases of case processing.

We do, however, have some concerns with your Draft Report and I offer the following comments in this regard.

In your Draft Report you have defined a backlog as those cases which have been pending in the Court for 1 year or more after being filed. While you have noted that some Judges believe that case complexity can cause a minority of cases to be pending for over a year, we believe that the issue of case complexity should be more fully developed so that the uninformed reader clearly understands the unavoidable impact of these cases and why they do not lend themselves to disposition in a year or less. This becomes particulary important when considering the charts on pages 16 and 18 of the Draft Report.

The chart on page 16 purports to illustrate the effectiveness of good case management on the number of cases pending 1 year or longer. The raw figures set forth in column 3 of that chart may, in and of themselves, be meaningless because the Draft Report fails to relate the figures to the total number of pending cases and case complexity. 1/

A better method of illustrating your point would be to indicate what percentage of the total cases pending had been pending 1 year or longer as of June 30, 1978, and of that percentage what percentage consisted of non-complex litigation which could lend itself to disposition in less than 1 year.

The chart on page 18 may also be misleading because it fails to relate the raw figures in column 3 to case complexity. When examining the median time for disposition of all cases we note that this District median time is six months (120 days based on a 20 day work month). 2/

We recognize that many cases filed can be disposed of quickly. However, when dealing with a complex patent, trademark, multi-defendant securities, or aircraft crash case, for example even though the Court may be in a position to try these kinds of cases, the case may not be ready for trial for several years. As a result we find this minority of complex cases in increasing numbers when we examine cases one year or older.

Of major concern is the failure of the Draft Report to examine the impact of the criminal case loads on the work of the District Courts. Criminal case loads have a substantial effect on the civil calendar. As you know, Congress has mandated that criminal cases take precedence over all other business of the District Courts. The Speedy Trial Act sanctions which were not in effect at the time the Draft Report was written are now applicable and an additional significant impact on our workload is taking place. Additionally, criminal case complexity is having a significant impact on the District Courts workload. This District, for example, has experienced a 9.1% increase in the number of complex criminal cases filed, raising the percentage of complex criminal cases from 32.4% in Fiscal Year 1979 to 41.5% in Fiscal Year 1980. In view of this, we believe your recommendation to place additional time constraints on the processing of civil cases is premature. Such action could have an adverse effect on the Court's ability to manage all of its cases and should not be considered until the full impact of the Speedy Trial Act has been thoroughly reviewed.

On pages 22 and 23 of your Draft Report you discuss, as a contributing factor to the civil backlog, the lack of Judicial manpower resulting from illness or involvement in complex cases that consumed a great deal of time. What you have not discussed is the failure of Congress and the President to anticipate judicial vacancies and to fill such vacancies promptly. Allowing these vacant judgeships to remain unfilled for long periods of time contributes to the civil backlog.

1/Total number of cases pending as of June 30, 1979, added to chart on page 16.

2/This figure is misleading because it fails to take into account the total pending workload of the court. Further, the court has local rules that encourage the development of a case management system, but only 23 percent of the judges enforce the rules. This is significant because the court endorses the concept of case management.

A review of the historical data since 1969 shows that it has taken an average of 11.4 months to fill vacant judgeships in the Central District of California. Since June, 1975, this court has lost 93 judge months (7 years 9 months) because of the failure to promptly fill vacant judgeships.

With regard to the recommendations contained in the Draft Report concerning the expanded use of Magistrates to assist in civil case processing, this Court has utilized Magistrate resources fully to handle many facets of District Court work including discovery matters and prisoner petitions. Because of the heavy demands made on the Magistrates in those areas where they are assisting in the District Court work, we believe additional Magistrates are vitally necessary if there is to be an expansion of their duties in connection with civil litigation. The comment in the report that Courts which could have more effectively utilized Magistrates did not do so primarily because Judges would not relinquish such duties to them does not take into account that in this Court, for example, it is not practicable to do so until additional Magistrates resources are made available. In any event, in order to fully evaluate the effectiveness of Magistrates in accelerating the disposition of civil cases in the District Courts, an accurate analysis cannot be made until some time after the Magistrates are certified to try civil cases and sufficient time has elasped to develop meaningful data. 1/

The comments contained in this letter express a consensus of the views of the Judges of the Court. We hope that you find these comments useful and that they will be taken into consideration when preparing your final report.

If you wish to discuss any of the comments, please feel free to contact me.

Sincerely,

A Andrew Hauk

AAH:irm

1/At the time of our review this particular court had not certified its magistrates as authorized by the Federal Magistrate Act of 1979.

FRANK J. BATTISTI
CHIEF JUDGE

United States District Court
Northern District of Ohio
Cleveland, 44114

December 2, 1980

William J. Anderson, Director
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for submitting a copy of your proposed report detailing problems arising from the onerous civil caseload currently confronting Federal district courts. Two aspects of the report's recommendations to the Judicial Conference evoke the following brief comments.

It has been recommended that the Federal Rules of Civil Procedure be modified so as to include maximum time frames for the various steps in the litigative process. Such time limitations are presently not established by the Federal Rules and are instead the subject of myriad local rules throughout the country. The suggested uniform time frames will undoubtedly serve to expedite the civil process. I have often advocated the continued need for national uniformity of procedural rules in the face of the proliferation of diverse local rules. The diversity of local time limitations is, in my opinion, symptomatic of a more general problem.

Your report recommends that district courts make greater use of the magistrates as provided in the Federal Magistrate Act of 1979. Personal experience in this regard allows me to concur in this recommendation and to comment that I have found the use of magistrates in pre-trial proceedings to be especially useful.

Sincerely,

Frank J. Battisti

FJB:ffk

U.S. Department of Justice

Washington, D.C. 20530

DEC 15 1980

Mr. William J. Anderson
Director
General Accounting Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Federal Civil Case Backlog: A Localized Problem Which Can Be Eased."

The draft report recommends that the Judicial Conference modify the Federal Rules of Civil Procedure to include maximum time limits for various steps in the civil process and require each court to establish time frames within these limits, encourage the district courts to better utilize their clerks' offices in the administration of the courts, and encourage the district courts to make greater use of magistrates as provided in the Federal Magistrate Act of 1979.

The above matters are of interest to the Department and are related to some of the major projects being undertaken by the Office for Improvements in the Administration of Justice. Although we recognize that the principal concern and responsibility over the matters addressed in this report lie with the Federal Judicial Center and the Administrative Office of the United States Courts, we are taking this opportunity to provide some general observations.

Two of the three main findings of the report reaffirm the results of prior studies, namely, that in the area of judicial administration, (a) an effectively implemented case management system is markedly beneficial for courts with heavy case loads, and (b) adequate use of court clerks is very important in reducing case backlog. The General Accounting Office's (GAO) view--that Federal courts which have effectively implemented case management systems and which actively utilize court clerks to assist in processing civil cases experience a lesser backlog problem--is well supported by research that the Federal judiciary recently conducted through the Federal Judicial Center.

With regard to the third finding and recommendation in the report--that magistrates are not being fully utilized in Federal courts and that increased use of magistrates can help courts operate more efficiently--more data may be necessary before such a finding can be definitely ascertained. It is known that the frequency and nature of use of magistrates varies among district courts, but more research is needed to draw conclusions about what this implies, particularly since the expansion of the Federal magistrate's role and the increase in the number of Federal magistrates did not begin to materialize until as recently as October 10, 1980.[1]

GAO's recommendation to the Judicial Conference that the Federal Rules of Civil Procedure be amended to include maximum time limits for the various steps in the civil process is of special interest to the Department. It is apparent that amendments to the Federal Rules of Civil Procedure will probably produce improvement in the efficiency of the civil process, and at the very least will send a message to the judiciary that greater efficiency is a goal to be emphasized. The recent experience of the Federal judiciary in trying to deal with the backlog problem by improving the management and administration of the judicial system suggests that effective reform is difficult to achieve because of the many different variables subject to control. It is not clear that a uniform and centrally administered case management system would work well for a judicial system that is highly localized in nature, that is characterized by notable differences among its judges, types of cases, workload, legal culture and so forth, and in which diversity of approach and room for inventiveness have been traditionally regarded as desirable features. The fixing of maximum time limits, while it deserves further study, is a hopeful way of imposing an organized framework on the litigants. Care would have to be taken so that litigants do not expand procedural tasks to fill available time, but on balance the benefits from some kind of time limits would seem to outweigh this rather unlikely disadvantage. The Department is interested in pursuing the concept of time limits as an aid to judicial efficiency.

The above observations also suggest that the establishment of time frames should contain some degree of flexibility to allow for the variety and complexity of litigation. While the objective of the case management system should be to achieve a reduction of the civil case backlog and provide for effective management of caseloads, care must be exercised to assure that the system does not become an end unto itself with disregard for a viable civil process.

The Federal Rules of Civil Procedure were enacted to provide the procedural framework in which the interests of the litigants and the fair application of the Nation's civil laws are paramount. On the other hand, while it is true that the interests of the litigants are important, it is also true that the interests of society in an orderly and efficient justice system are important. In our opinion, the balancing of these two issues argues in favor of stronger control by the judiciary over the litigants before them in the form of time limits which are established early, tailored to the circumstances of each case, firmly but fairly maintained, and accompanied by other methods of sound judicial management.

1/The Federal Magistrate Act was passed October 10, 1979, not 1980.

We appreciate the opportunity to comment on the draft report. Should you desire any additional information, please feel free to contact me.

Sincerely,

Kevin D. Rooney

Kevin D. Rooney
Assistant Attorney General
for Administration

(188470)

DEBATE PROPOSITION THREE

Resolved: That the United States Should Establish Uniform Rules Governing the Procedure of all Criminal Courts

The third of the debate resolutions addresses the possible establishment of a uniform set of rules of criminal procedure which would be acceptable to all criminal courts in the nation. A consideration of this topic might include questions with respect to pre-trial detention, plea bargaining, discovery, or sentencing, among other areas of discussion.

In a criminal action, the government seeks to protect the public by prosecuting an individual accused of violating a statute which prohibits a specific act or omission. Should the defendant be convicted, a criminal penalty such as a fine or a term of imprisonment may be imposed.

Suggested State Legislation on Criminal Justice Standards and Goals

Project Staff

Jack D. Foster, Director
David H. Ashley

This project was supported by Grant 75DF-99-0061 from the Law Enforcement Assistance Administration, U.S. Department of Justice. The contents of this publication do not necessarily reflect the views of the Law Enforcement Assistance Administration or the Council of State Governments.

RM-591
THE COUNCIL OF STATE GOVERNMENTS
Lexington, Kentucky

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Foreword

On October 20, 1971, the National Advisory Commission on Criminal Justice Standards and Goals was appointed to formulate, for the first time, standards and goals for crime reduction. Task Force reports of the commission were issued in 1973. These standards and goals were promulgated as advisory, and were intended to be a starting point from which States and localities could begin to deal with some of the more persistent problems in criminal justice.

Since publication of the reports, there has been a continuing effort on the part of the Law Enforcement Assistance Administration to assist States and local governments in implementing these standards and goals. The model acts contained in this publication represent a vehicle for use by the States in this task. They provide, in draft legislation form, certain priority standards and goals for consideration by State Legislatures in the introduction of criminal justice legislation.

Brevard Crihfield
Executive Director
The Council of State Governments

Lexington, Kentucky
September 1976

Preface

In 1974 the Law Enforcement Assistance Administration and the Council of State Governments agreed that the annual Council publication, *Suggested State Legislation,* would provide a suitable vehicle through which assistance could be given to the States in the implementation of certain standards and goals of the National Advisory Commission on Criminal Justice Standards and Goals. The model acts contained in this volume are the result of that agreement. The acts also appear in the 1977 issue of *Suggested State Legislation.*

In December 1975, the Council's Section on Law and Justice began the process of distilling the some 500 National Advisory Commission standards, goals, and recommendations in order to arrive at a group of about 24 which would lend themselves to the legislative process. From this list, and in consultation with the Law Enforcement Assistance Administration, priority standards were selected and draft legislation, incorporating specific National Advisory Commission standards, was prepared. The model legislation was then submitted to the regular process of the Committee on Suggested State Legislation. This process included discussion of the material by panels of the Committee, which includes members of State Legislatures, state officials, Commissioners on Interstate Cooperation, Commissioners on Uniform State Laws, Attorneys General, and legislative staff. Additionally, the Committee receives commentary and advice from various representatives of nongovernmental organizations. The material which is included in this volume and the 1977 issue of *Suggested State Legislation* is the product of that process, having been in some cases amended and approved by the Committee. Obviously, only that material receiving approval for inclusion in its annual publication is included here.

The model legislation dealing with the licensing and regulation of private security guards is the product of the Private Security Advisory Council, Law Enforcement Assistance Administration, U.S. Department of Justice.

We are pleased to be able to offer this material, and sincerely hope State Legislatures considering legislation in the areas of plea negotiations, licensing and regulation of private security guards, and diversion programs will find this material beneficial.

Plea Negotiations Act

Of all the procedures in the judicial process, perhaps the most difficult for persons both within and without the criminal justice system to comprehend is that of plea negotiation. Plea negotiations have also come under more criticism, whether justifiable or not, from the public and from persons within the criminal justice system than perhaps any other single judicial process. The process is criticized as being a bargaining session or a horse-trading process. The process is difficult for the offender to comprehend because seldom does he participate in the actual plea negotiation process. Plea negotiations are often viewed with a jaundiced eye by the public because an offender charged originally with a serious crime may later have the original charge reduced to a lesser offense and receive a relatively light sentence. The real problem in plea negotiation is its total lack of visibility.

The National Advisory Commission on Criminal Justice Standards and Goals, in its report on courts in Section 3.1, recommended the complete abolition of plea-bargaining in all criminal cases. The Plea Negotiations Act recognizes the inherent dangers in plea negotiation, but at the same time recognizes the necessity and the need for the process both from the standpoint of implementing diversion programs and from the standpoint of alleviating overly congested courts. The Plea Negotiations Act includes the recommendations, made by the National Advisory Commission on Criminal Justice Standards and Goals contained in the report on courts beginning in Section 3.2, that if plea negotiations, as recommended by the commission were not abolished, certain guidelines should be established to ensure that all constitutional protections and a sense of fairness to all parties are maintained.

The Plea Negotiations Act formalizes the plea-bargaining process. The intent of the legislation is to give plea negotiations a certain degree of visibility and comprehensiveness as far as both the offender and the public are concerned. The act requires a judicial record of the plea and of the agreement underlying it and its acceptance or rejection by the court and the reasons therefor. The act also provides for a set of plea negotiation practices, establishes a time limit prior to the trial date at which point all plea negotiations must cease in order to maintain accurate trial dockets, requires representation by counsel at any and all stages of the plea negotiation process, and contains a prohibition against coercion by either the prosecution or defense counsel to enter a plea. The act further sets forth criteria for acceptance of a negotiated plea by the court. The plea of "nolo contendere" is included in the act as an alternative plea for inclusion in those States in which such a plea is either constitutionally or statutorily available. Nothing in the act is intended to abrogate in any way a defendant's right to enter a plea of nolo contendere.

This act was prepared by the staff of the Criminal Justice Project of the Council of State Governments.

4

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [*Short Title.*] This act may be cited as the [State] Plea Negotiations Act.

Section 2. [*Pleading by a Defendant.*]

(a) A defendant may plead not guilty or guilty [or, when allowed under the law of the jurisdiction, nolo contendere]. A plea of guilty [or nolo contendere] should be received only from the defendant himself in open court.

[(b) A defendant may plead nolo contendere only with the consent of the court. Such a plea should be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.]

Section 3. [*Pleading to Other Offenses.*] Upon entry of a plea of guilty [or nolo contendere] or after conviction on a plea of not guilty, the defendant's counsel may request permission for the defendant to enter a plea of guilty [or nolo contendere] as to other crimes he has committed which are within the jurisdiction of the coordinate courts of the State. Upon written approval of the prosecuting attorney of the governmental unit in which these crimes are charged or could be charged, the defendant should be allowed to enter the plea [subject to the court's discretion to refuse a nolo contendere plea]. Entry of such a plea constitutes a waiver of: (1) venue, as to crimes committed in other governmental units of the State, and (2) formal charges as to offenses not yet charged.

Section 4. [*Aid of Counsel; Time for Deliberation.*]

(a) A defendant shall not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for appointment of counsel, until counsel has been appointed or waived; a defendant with counsel shall not be required to enter a plea if his counsel makes a reasonable request for additional time to hold a plea conference pursuant to Section 5, or to represent the defendant's interests in other respects.

(b) Except as provided in subsection (a) of this section, a defendant who has waived counsel shall not be called upon to plead within less than seven days following the date he was held to answer or was otherwise informed of the charge, and the court shall not accept a plea of guilty [or nolo contendere] from such a defendant unless it is entered affirmed at least three days after the defendant received advice from the court required by Section 9.

(c) A defendant may be offered an opportunity to plead and a plea may be accepted without regard to the time periods provided for in subsection (b) of this section if the offense of which he is convicted is not a felony and if the sentence posed does not provide for his incarceration unless he violates conditions of probation or a suspended sentence.

Section 5. [*Procedure for Plea Discussions.*] At the request of either party, the parties shall meet to discuss the possibility that upon the defendant's entry of a plea of guilty [or nolo contendere] to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or will not oppose a particular sentence. The defendant must be represented by counsel in such discussions and the defendant need not be present. The court shall not participate in such discussions.

Section 6. [*Prosecutor's Regulations.*]

(a) [Each prosecution office in the State] shall formulate guidelines and procedures with respect to plea discussions and plea agreements designed to afford similarly situated defendants equal opportunities for plea discussions and plea agreements.

Comment: A State should make a choice between having a single state official establish guidelines as distinguished from establishment of the guidelines by local officials.

(b) The written policy statement as provided in subsection (a) of this section shall provide for consideration of the following factors by prosecuting attorneys involved in plea negotiations:

(1) The impact a formal trial would have on the offender and those close to him, especially the likelihood and seriousness of financial hardship and family disruption.

(2) The role that a negotiated plea agreement may play in rehabilitating the offender.

(3) The value of trial in fostering the community's sense of security and confidence in law enforcement agencies.

(4) The assistance rendered by the offender:

(i) In the apprehension or conviction of other offenders.

(ii) In the prevention of crimes by others.

(iii) In the reduction of the impact of the offense on the victim.

(iv) In any other socially beneficial activities.

(c) The written statement of policy shall direct that before finalizing any plea negotiations, the prosecuting attorney's staff shall obtain full information on the offense and the offender. This information should include information concerning the impact of the offense upon the victims, the impact of the offense upon the community, the amount of police resources expended in investigating the offense and apprehending the defendant, any relationship between the defendant and organized crime, and other matters similarly bearing upon the nature of the offense and the offender.

Section 7. [*Improper Activities by a Prosecuting Attorney.*] No prosecuting attorney shall, in connection with plea negotiations, engage in, perform, or condone any of the following:

(1) Charging or threatening to charge the defendant with offenses for which the admissible evidence available to the prosecuting attorney is insufficient to support a guilty verdict.

(2) Charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for conduct allegedly engaged in by him.

(3) Threatening the defendant that if he should plead not guilty his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty.

(4) Failing to grant full disclosure before the disposition negotiations of all exculpatory evidence.

Section 8. [*Preliminary Consideration of a Plea Agreement.*]

(a) If the parties have reached a proposed plea agreement they may, with the permission of the court, advise the court of the terms of the agreement and the reasons therefor in advance of the time for tender of the plea. The court may indicate to the parties whether it will concur in the proposed disposition. Any such concurrence shall be subject to the information contained in the pre-sentence report being consistent with representations made by the parties to the court.

(b) Whenever a plea of guilty is offered, the court shall inquire as to the existence of any agreement. The court shall review any negotiated plea agreement and make specific determinations relating to the acceptability of the agreement. Underlying an offered plea of guilty, the court shall make such determinations relating to the acceptability of a plea before accepting it.

(c) Before accepting a plea of guilty, the court shall require the defendant to make a detailed statement concerning the commission of the offense to which he is pleading guilty and any offenses of which he has been previously convicted. In the event that the plea is found unacceptable, the statement and any evidence obtained through use of it shall not be admissible against the defendant in any subsequent criminal prosecution.

Section 9. [*Defendant's Understanding of His Rights and Consequences of Plea.*] The court shall inquire personally of the defendant concerning his plea and its underlying negotiated agreement, and if any of the following circumstances are found, and cannot be corrected by the court, the court shall not accept the plea:

(1) That counsel was not present during the plea negotiations.

(2) That the defendant is not competent or does not understand the nature and consequence of the charges and proceedings against him.

(3) That the defendant was reasonably mistaken or ignorant as to

the law or facts related to his case and this affected his decision to enter into a plea agreement.

(4) That the defendant does not know his constitutional rights and how his plea of guilty will affect those rights. Rights that expressly should be waived upon the entry of a guilty plea include: the right to the privilege against compulsory self-incrimination, which includes the right to plead not guilty; the right to trial in which the State, or governmental unit, must prove the defendant's guilt beyond a reasonable doubt; the right to a trial by jury; the right to confrontation of one's accusers; the right to compulsory process to obtain favorable witnesses; and the right to effective assistance of counsel at trial.

(5) During plea negotiations the defendant was denied constitutional or significant substantive rights that he did not waive.

(6) The defendant did not know at the time he entered into the agreement the mandatory minimum sentence, if any, and the maximum sentence that may be imposed for the offense to which he pleads, or that the defendant was not aware of those facts at the time his plea was offered.

(7) The defendant had been offered improper inducements to enter a plea of guilty.

(8) That the admissible evidence is insufficient to support a guilty verdict on the offense for which the plea is offered, or to a related greater offense.

(9) The defendant continues to assert facts that, if true, establish that he is not guilty of the offense to which he seeks to plead.

(10) That accepting the plea would not serve the public interest. Accepting a plea of guilty would not serve the public interest if it:

(i) Places the safety of persons or valuable property in unreasonable jeopardy.

(ii) Depreciates the seriousness of the defendant's activity or otherwise promotes disrespect for the criminal justice system.

(iii) Gives inadequate weight to the defendant's rehabilitative needs.

(iv) Would result in conviction for an offense out of proportion to the seriousness with which the community would evaluate the defendant's conduct upon which the charge is based.

Section 10. [*Pre-sentence Investigation.*] The court may direct its probation service to conduct an investigation to assist it in ruling on a plea agreement. If the court believes it appropriate it may direct that such investigation be commenced at the time a plea agreement is presented for preliminary consideration pursuant to Section 8.

Section 11. [*Ruling on a Plea of Guilty.*] Before accepting a plea pursuant to a plea agreement, the court shall advise the parties whether it approves the agreement and will dispose of the case in accordance therewith. If the court should determine to disapprove the agreement and not to dispose of the case in accordance therewith, it shall so inform the parties, not accept the defendant's plea of guilty [or nolo contendere], and then advise the defendant personally that he is not bound by the agreement. The court shall advise the parties of the reasons for which it rejected the agreement and afford them an opportunity to modify the agreement accordingly. A decision by the court disapproving an agreement shall not be subject to appeal.

Section 12. [*Plea Discussion and Agreement Not Admissible.*] Unless the defendant subsequently enters a plea of guilty [or nolo contendere] which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement shall not be received in evidence or in favor of the defendant in any criminal or civil action or administrative proceeding.

Section 13. [*Verbatim Record of the Proceedings.*] A verbatim record of the proceedings at which the defendant enters a plea of guilty and of any preliminary consideration of a plea agreement by the court pursuant to Section 8 shall be made. Such record shall include the court's advice to the defendant and its inquiries of the defendant, defense counsel, and the prosecutor, and any responses. If the plea agreement has been reduced to writing it shall be made a part of the record; otherwise, the court shall require that the terms of the agreement be stated for the record and that the assent thereto of the defendant, his counsel, and the prosecutor be also recorded.

Section 14. [*Time Limit on Plea Negotiations.*] Each judicial district shall set a time limit prior to the date set for trial after which time plea negotiations may no longer be conducted. After the specific time limit has elapsed, only pleas to the official charge should be allowed, except in unusual circumstances and with the approval of the court and the prosecution.

Section 15. [*Severability.*] [Insert severability clause.]

Section 16. [*Repeal.*] [Insert repealer clause.]

Section 17. [*Effective Date.*] [Insert effective date.]

Diversion Program Act

Perhaps the most centralized theme running throughout all of the reports of the National Advisory Commission on Criminal Justice Standards and Goals on the entire criminal justice system is that of diversion. The term "diversion," as used within the framework of the criminal justice system, is the procedure of postponing prosecution of a criminal offense either temporarily or permanently. The purpose of diversion is to offer an offender an alternative method of rehabilitation, other than incarceration or probation, which will bring about the offender's future compliance with the law.

The process of diversion must utilize a wide range of agencies and services in order to provide an offender with the opportunity to rehabilitate himself prior to becoming inexorably entrenched in the criminal justice system. The process of diversion and the use of diversionary techniques by the prosecution, by courts, and by correctional personnel, are in large measure dependent upon a high degree of flexibility to achieve the desired end result of offender rehabilitation.

Presently, although the acceptance of the concept of diversion as a tool to alleviate many of the problems of the criminal justice system is almost universal, the use of diversionary techniques and the process of diversion itself have not been legislated in most States. The fact that diversionary techniques are not recognized statutorily gives rise to a very critical factor that persons or agencies employing diversion programs may well run the risk of considerable personal liability when the program, agency, or personnel employed for an offender's rehabilitative program may not be able to achieve a desirable end result. Such liability may well run to the States themselves in many instances.

While not in any way attempting to restrict the use of diversion programs by legislatively structuring such programs, the Diversion Program Act attempts to define criteria by which those using diversion could assess the circumstances and the individual's candidacy for entering the diversionary process. Standards set forth by the National Advisory Commission on Criminal Justice Standards and Goals in its report on corrections (Section 3.1 and following) are embodied in the model act establishing general criteria for the use of diversion. The act requires that upon enactment each district or county attorney shall prepare and issue regulations consistent with the criteria established by the act to provide office criteria for the use of diversion programs. The use of a pre-trial and even pre-charge conference at which the offender, the prosecution, defense counsel, and correctional personnel may discuss the offense, the offender's eligibility to enter into a diversion program, and the diversion program for the specific offender is a unique feature of the act. The act finally sets forth those instances in which diversion shall be appropriate before a formal decision to charge, to continue, or to prosecute an offense is made. The ultimate decision is still left to the prosecutor. Court approval of a diversion program is required only when the diversion program results from the dismissal of a charge or a continuance, or a suspended sentence based upon the successful completion of the rehabilitative program set forth for the offender.

This draft act was prepared by the staff of the Criminal Justice Project of the Council of State Governments.

10

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [*Short Title.*] This act may be cited as the [State] Diversion Program Act.

Section 2. [*Definitions.*] As used in this act:

(1) "Diversion" means the procedure of postponing prosecution either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication. The purpose of diversion is to offer the offender an alternative method of rehabilitation other than incarceration or probation which will bring about the offender's future compliance with the law.

(2) "Dangerous offender" means a person who has committed an offense, and whose history, character, and condition reveal a substantial risk that he will be a danger to others, and whose conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with indifference to the consequences.

Section 3. [*Diversionary Conference.*]

(a) [Each district [county] attorney] shall prepare and issue guidelines consistent with this act, providing for a diversion conference at which the prosecutor, defense counsel, and offender may meet to discuss the case. These regulations shall identify those classes of cases in which the prosecutor may schedule a conference and shall further provide that the prosecutor shall schedule a conference in any other case for which defense counsel or the offender requests a conference or for which the prosecutor believes a conference is desirable. To the extent the prosecutor believes feasible in the effective administration of justice, such regulations shall include guidelines concerning action which the prosecutor will consider taking in certain types of cases or factual situations.

Comment: A State should make a choice between having a single state official establish guidelines as distinguished from establishment of the guidelines by local officials.

(b) At the diversion conference, the prosecutor shall afford either the offender or his counsel the opportunity to advance arguments and present facts bearing on the issues and shall inform the offender or his counsel of his views and the reasons therefor in a manner that will give the offender or his counsel the opportunity to respond. The parties may discuss and agree upon a disposition of the case which may include dismissal or suspension of the prosecution. The parties may agree that a particular disposition shall be conditioned upon the offender's participating in a supervised rehabilitation program.

(c) In any case in which the prosecutor is considering charging an offense punishable by imprisonment for more than [1] year, the offender must be represented by counsel.

(d) In all cases where an individual is found eligible for diversion, a written report shall be made and retained on file in the prosecutor's office, regardless of whether the individual is finally rejected or accepted for a diversionary program. A copy of this report shall be provided to the offender and the offender's counsel. In addition, copies may be provided to those agencies which may be involved in developing treatment programs with the offender. All parties concerned shall take due care to ensure the privacy of the diversionary reports.

(e) The process of diversion and the diversion conference, if such a conference is held, cannot be used to coerce a guilty plea from an offender, even though there is reasonable assumption of the offender's guilt. [The offender, or an accused, shall not be required to enter any formal plea to a charge made against him as a condition for participation in a diversion program.] Participation in a diversion program shall not be used in subsequent proceedings relative to a charge as evidence of an admission of guilt.

(f) Each individual who is charged must be provided with a sheet of facts about the diversion process.

(g) In any case in which an offender agrees to a specific diversion program, a specific agreement shall be made between the prosecution and the offender. This agreement shall include the terms of the diversion program, the length of the program, and a section therein stating the period of time after which the prosecutor will either move to dismiss the charge or to seek a conviction based upon that charge. This agreement must be signed by the offender and his counsel, if represented by counsel, and filed in the prosecutor's office.

(h) No diversion or diversionary program will take place without the written consent of the offender.

(i) Prior to formal entry into a diversion program, the prosecutor may require the offender to inform him concerning the offender's past criminal record, if any, his education and work record, his family history, his medical or psychiatric treatment or care he has received, any psychological test he has taken, and other information bearing on the prosecutor's decision for an appropriate disposition of the case.

(j) If the case should go to trial, any statements made by an offender or his counsel in connection with any pre-charge discussions concerning diversion shall not be admissible in evidence.

Section 4. [*General Criteria.*] The written policies developed by the prosecutor's offices shall contain policies for the diversion of offenders. Prior to authorizing diversion, the following factors should be taken into account:

(1) Whether there is substantial likelihood that justice will be served and the community will be safe if the individual is placed in a diversion program, or a decision is made simply not to prosecute his case.

(2) Whether the needs of an offender can better be met outside the criminal justice system and if resources are available to meet these needs.

(3) Whether the offense neither caused nor threatened serious physical harm to persons or property, or the offender did not contemplate that it would do so.

(4) Whether the offense was the result of circumstances unlikely to recur.

(5) Whether the victim of the offense induced or facilitated the offense.

(6) Whether there are substantial grounds tending to excuse or justify the offense, though failing to establish a defense.

(7) Whether the offender acted under strong provocation.

(8) Whether the offender has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial time before commission of the present offense.

(9) Whether the offender is likely to respond quickly to correctional or rehabilitative treatment.

Section 5. [*Exclusions.*] An individual should not be considered for a diversion program in those circumstances in which he has been known to be unresponsive to previous diversionary programs. A diversion program should not be considered for an individual who may be considered a dangerous offender.

Section 6. [*Maintaining Dispositions List.*] [Each district [county] attorney's] office shall maintain a current and complete listing of various resource dispositions available to it. This listing shall be compiled and evaluated in conjunction with law enforcement agencies, correctional agencies, courts, and defense counsel. This listing shall be subject to periodic review and evaluation, and shall be made public.

Section 7. [*Severability.*] [Insert severability clause.]

Section 8. [*Repeal.*] [Insert repealer clause.]

Section 9. [*Effective Date.*] [Insert effective date.]

Private Security Licensing and Regulatory Act

In its reports issued in 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that all private security agencies should be required to obtain state licensing as a prerequisite for engaging in police-related security functions. The commission felt that licensing requirements would allow state control of important considerations such as the selection of standards for private police personnel, the educational criteria for employment, and the minimum training necessary for private police forces. States would then be able to control the activities of security forces by revoking or withdrawing licenses when minimum performance standards were not met. Prior to the issuance of the commission's recommendations in 1973, the Private Security Advisory Council to the U.S. Department of Justice Law Enforcement Assistance Administration had been meeting on a regular basis to furnish advisories to LEAA on the more effective use of private security in the national strategy to reduce crime. The advisory council had prepared many written reports concerning its findings to LEAA. It was a finding of the advisory council that an increasing number of States and municipalities were in the process of considering, or had already enacted, legislation related to the licensing and regulation of private security guards. After some two years of concentrated effort, including public hearings, the Private Security Advisory Council developed the Private Security Licensing and Regulatory Act.

The act requires licensing of all contract security companies; however, it exempts proprietary security (in-house) organizations from the licensing requirement. The act defines proprietary security organizations as a person who provides security services solely for the benefit of such person, thereby making some organizations such as shopping mall and stadium operators who provide such services for persons other than themselves contract security companies. The act requires applicants for a license to possess at least three years of security supervisory experience or to pass an examination. The act further recognizes two categories of private security without regard to the nature of their employer, i.e., armed private security officers and unarmed uniformed private security officers, and sets forth basic minimum training standards for each. An important consideration of this act is that it requires all training to be given and certified by a state-approved trainer. The act includes in its coverage all security guards, armored car guards, armed courier service guards, and alarm response runners. The minimum criteria for registration under the act as a private security guard are, of course, also set forth in the statute.

The Private Security Licensing and Regulatory Act was drafted by Dennis M. Crowley, Jr., and Richard D. Bickelman of the New England Bureau for Criminal Justice Services under the direction of the Private Security Advisory Council and its Chairman, Arthur J. Bilek.

Suggested Legislation

(Title, enacting clause, etc.)

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Section 1. [*Short Title.*] This act may be cited as the [Státe] Private Security Licensing and Regulatory Act.

Section 2. [*Definitions.*] As used in this act:

(1) "Alarm response runner" means an individual employed by a contract security company or a proprietary security organization to respond to security system signals, other than a person whose sole function is to maintain or repair a security system.

(2) "Armed courier service" means a person that transports or offers to transport under armed security guard from one place or point to another place or point, valuables, currency, documents, papers, maps, stocks, bonds, checks, or any other item that requires expeditious delivery.

(3) "Armed private security officer" means an individual employed by a contract security company or a proprietary security organization whose principal duty is that of an armed security guard, armed armored car service guard, armed courier service guard or armed alarm response runner, and who at any time wears, carries, possesses, or has access to a firearm in the performance of his duties.

(4) "Armored car service" means a person that transports or offers to transport under armed security guard from one place or point to another place or point, currency, jewels, stocks, bonds, paintings, or other valuables of any kind, or other items in a specially equipped motor vehicle which offers a high degree of security.

(5) "Branch office" means any office of a licensee within the State other than its principal place of business within the State.

(6) "Certified trainer" means a person approved and certified by the licensing authority as qualified to administer and certify to successful completion of the minimum training requirements for private security officers required by Section 36.

(7) "Contract security company" means a person engaging in the business of providing, or undertakes to provide, a security guard, an alarm response runner, armored car service, or armed courier service, as defined in this act, on a contractual basis for another person.

(8) "Employer/employee relationship" means the performance of any service for wages or under any contract of hire, written, oral, expressed or implied by an individual, and provided the employer has control or direction over the performance of such service both under this contract or service and provided that such service is performed personally by such individual.

(9) "Identification card" means a pocket card issued by a licensing authority to a private security officer as evidence that the individual has met the minimum qualifications required to perform duties of an unarmed private security officer.

(10) "Licensee" means a person to whom a license is granted in accordance with the provisions of this act.

(11) "Licensing authority" means the Secretary of State or other

appropriate department, agency, or bureau of the State designated to administer and enforce this act.

(12) "Person" means an individual, firm, association, company, partnership, corporation, nonprofit organization, institution, or similar entity.

(13) "Police chief executive" means the elected or appointed police administrator of any municipal, county, or state police department or sheriff's department, such department having full law enforcement powers in its jurisdiction.

(14) "Principal corporate officer" means the president, vice president, treasurer, secretary, and comptroller, as well as any other person who performs functions for the corporation corresponding to those performed by the foregoing officers.

(15) "Proprietary security organization" means a person or department of that person which employs a security guard, an alarm response runner, armored car service, or armed courier services, as defined in this act, solely for such person, and wherein an employer/employee relationship exists.

(16) "Qualifying agent" means, in the case of a corporation, an officer or an individual in a management capacity, or in the case of a partnership, a general or unlimited partner, meeting the experience qualifications set forth in this act for operating a contract security company.

(17) "Registrant" means an individual who has a valid registration card issued by the licensing authority.

(18) "Registration card" means the permanent permit issued by the licensing authority to a registrant as evidence that the registrant has met the minimum qualifications required by this act to perform the duties of an armed private security officer.

(19) "Security alarm system" means an assembly of equipment and devices (or a single device such as a solid-state unit which plugs directly into a 110-volt AC line) designated to detect or signal an unauthorized intrusion into, movement through, or exit from, a premise, or to signal an attempted robbery or other criminal acts at a protected premise; with respect to such signals, police and/or security guards or alarm response runners are expected to respond. Fire alarm systems and alarm systems which monitor temperature, humidity, or any other conditions not directly related to the detection of an unauthorized intrusion into premises or an attempted robbery at a premises are excluded from the provisions of this act.

(20) "Security guard" means an individual principally employed to protect persons or property from criminal activities and whose duties include, but are not limited to, the prevention of: unlawful intrusion or entry, larceny, vandalism, abuse, arson, or trespass on private property; or control regulation or direction of the flow or movements of the public, whether by vehicle, on foot, or otherwise; and street patrol service or

merchant patrol service. Persons whose duties are limited to custodial or observational duties or the reporting of administrative regulations only are specifically excluded from this definition.

(21) "Street patrol service" means any contract security company or proprietary security organization that utilizes foot patrols, motor vehicles, or any other means of transportation in public areas or on public thoroughfares in the performance of its security functions.

(22) "Sworn peace officer" means an individual who derives plenary or special law enforcement powers from, and is an employee of, the federal government, [State], or any political subdivision, agency, department, branch, or service of either, of any municipality, or of any other unit of local government.

(23) "Unarmed private security officer" means an individual employed by a contract security company or a proprietary security organization whose principal duty is that of a security guard, armored car service guard, or alarm response runner; who never wears, carries, or has access to a firearm in the performance of those duties; and who wears dress of a distinctive design or fashion, or dress having any symbol, badge, emblem, insignia, or device which identifies or tends to identify the wearer as a security guard, alarm response runner, or armored car service guard.

Section 3. [*Establishment of a Licensing Authority.*]

(a) A Private Security Industry Regulatory Board is established, hereinafter called the licensing authority or board, designated to carry out the duties and functions conferred upon it by this act.

(b) The position of director of the Private Security Industry Regulatory Board is created. He shall serve as the chief administrator of the board. He shall not be a member of the board but shall be a full-time employee of the board, fully compensable in an amount to be determined by the Legislature. The director shall perform such duties as may be prescribed by the board except those duties vested in the board by Section 10, and shall have no financial or business interests or affiliations, contingent or otherwise, in any person rendering private security services.

Section 4. [*Licensing Authority Seal.*] The licensing authority shall have a seal, the form of which it shall prescribe.

Section 5. [*Board Meeting.*] The board shall consist of the following members:

(1) The Attorney General or his duly designated representative shall serve as an ex officio member of the board, and his service shall not jeopardize his official capacity with the State.

(2) The director of the [department of public safety] or his duly designated representative shall serve as an ex officio member of the board, and his service shall not jeopardize his official capacity with the State.

(3) One police chief executive appointed by the Governor subject to legislative confirmation.

(4) Two members shall be appointed by the Governor, subject to legislative confirmation, who are licensed under the provision of this act, who have been engaged for a period of three years in the rendering of private security services and are not employed by or affiliated with any other member of the board.

(5) Two members shall be appointed by the Governor, subject to legislative confirmation, who are selected from the public at large, who are citizens of the United States and residents of the State and are not now or in the past employed by or affiliated with a person rendering private security services.

(6) Two members shall be appointed by the Governor, subject to legislative confirmation, who are citizens of the United States and residents of the State and are full-time managers responsible for a proprietary security organization function.

Section 6. [*Chairmanship of Board.*] The Governor shall designate one appointee to sit as chairman of the licensing authority for that member's full term.

Section 7. [*Voting Powers and Procedures.*]

(a) No action shall be taken by the board unless a quorum of the membership of the board is present.

(b) All powers, duties, and responsibilities conferred upon the board by this act may be exercised or taken by a majority vote of the necessary quorum then present.

Section 8. [*Terms of Office.*]

(a) The director of the [department of public safety] and the Attorney General, or their representatives, shall serve on the board during their terms of office and shall perform the duties required by this act in addition to those duties required of them in other official capacities.

(b) The appointed members of the board shall serve six-year terms, their terms to be staggered by the appointment of the initial appointees as follows: the police chief executive and one proprietary security organization manager for an initial term of two years; one licensee and one public at-large member for an initial term of four years; and the remaining members for initial terms of six years.

Section 9. [*Vacancies.*] The Governor shall, subject to legislative confirmation, fill vacancies occurring among appointed members of the board with appointments for the duration of the unexpired term. Appointees must meet the qualification for that position to be filled as stipulated in Section 5.

Section 10. [*Powers of the Licensing Authority Relating to Rules and Regulations; Petitions.*] The following powers are vested in the licensing authority:

(1) Promulgation of rules and regulations which are reasonable, proper, and necessary to carry out the functions of the licensing authority; investigations limited to determinations as to whether the provisions of this act are being complied with or violated; enforcement of the provisions of this act; establishment of procedures for the preparation and processing of examinations, applications, license certificates, registration and identification cards, renewals, appeals, hearings, and rulemaking proceedings; and determination of the qualifications of licensees and private security officers consistent with the provisions of this act.

(2) An interested person may petition the licensing authority to enact, amend, or repeal any rule or regulation within the scope of subsection (1) of this section. The licensing authority shall prescribe by rule the form for such petitions and procedures for their submission, consideration, and disposition.

Section 11. [*Subpoenas; Oaths; Contempt Powers.*]

(a) In any investigation conducted under the provisions of this act, the licensing authority may issue subpoenas to compel the attendance of witnesses and the production of relevant books, accounts, records, and documents. The officer conducting a hearing may administer oaths and may require testimony or evidence to be given under oath.

(b) If a witness refuses to obey a subpoena or to give any evidence relevant to proper inquiry by the licensing authority, the licensing authority may petition a court of competent jurisdiction in the State to compel the witness to obey the subpoena or to give the evidence. The court shall promptly issue process to the witness and shall hold a hearing on the petition as soon as possible. If the witness then refuses, without reasonable cause or legal grounds, to be examined or to give evidence relevant to proper inquiry by the licensing authority, the court may cite the witness for contempt.

Section 12. [*Public Notice and Hearing on Proposed Rulemaking.*] [For information under this topic, follow the State's Administrative Procedures Act.]

Section 13. [*Requirement for License.*]

(a) It shall be unlawful and punishable, as provided in Section 42 of this act, for any person to engage in the business of a contract security company in the State without having first obtained a contract security company license from the state licensing authority, subject to subsection (b) of this section.

(b) Every person engaged in the contract security company business in the State on the effective date of this act shall have 180 days to apply to the licensing authority for a license to operate a contract security company. Any such person filing a timely application may continue to engage in business pending a final determination of the application.

(c) Unless there is a separate statute currently in effect in the State by which an alarm, armed courier service, or armored car business is licensed and regulated, all provisions of this act shall apply equally to the businesses which shall be considered as contract security companies. If there is a separate statute in effect in the State by which alarm, armed courier service, and armored car businesses are licensed and regulated, the licensing provisions of this statute shall not apply to such businesses unless such businesses are also engaged in the business of providing security guard services.

Section 14. [*Form of Application.*]

(a) Application for license required by the provisions of this act shall be filed with the licensing authority on a form provided by the licensing authority. If the applicant is an individual, the application shall be subscribed and sworn to by such person. If the applicant is a partnership, the application shall be subscribed and sworn to by each partner. If the applicant is a corporation, the application shall be subscribed and sworn to by at least one principal corporate officer. The application shall contain:

(1) The full name and business address of the applicant and, if the applicant is a corporation or partnership, the name and address of the qualifying agent.

(2) The name under which the applicant intends to do business.

(3) The address of the principal place of business and all branch offices of the applicant in the State, and the corporate headquarters of the business if outside of the State.

(4) If the applicant is a corporation, the correct legal name, the State of incorporation, and the date it qualified to do business in the State.

(5) A list of principal officers of the corporation and the business address, residence address, and the office or position held by each officer in the corporation.

(6) (i) For each applicant, or if the applicant is a partnership, for each partner, or if the applicant is a corporation, for the qualifying agent, the following information: (A) full name, (B) age, (C) date and place of birth, (D) all residences during the immediate past five years, (E) all employment or occupations engaged in during the immediate past five years, (F) two sets of classifiable fingerprints, (G) a photograph taken within the last six months of a size prescribed by the licensing authority, (H) a general physical description, (I) letters attesting to good moral character from three reputable individuals not related by blood or marriage who have known the applicant or qualifying agent for at least five years, (J) three credit references from lending institutions or business firms with whom the applicant or qualifying agent has established a credit record, and (K) a list of all arrests, convictions, and pending criminal

charges in any jurisdiction, any felony, any crime involving moral turpitude, or illegally using or possessing a dangerous weapon, for any of which a full pardon (or similar relief) has not been granted.

(ii) For every required person, a statement of experience that meets the qualifications of Section 15(a)(7).

(7) For each applicant which is a corporation or partnership, the names and addresses of each principal officer, director, or partner, whichever is applicable and unless the stock of such corporation is listed on a national securities exchange or registered under Section 12 of the Securities and Exchange Act of 1934, as amended, the names and addresses of all stockholders.

(b) The licensing authority may require that the application include any other information which the licensing authority may reasonably deem necessary to determine whether the applicant or individual signing the application meets the requirements of this act or to establish the truth of the facts set forth in the application.

(c) Any individual signing a license application must be at least [the legal age for licensing generally established in the State] years of age.

Section 15. [*License Qualifications.*]

(a) Every applicant, or in the case of a partnership each partner, or in the case of a corporation the qualifying agent, shall meet the following qualifications before he may engage in the business of a contract security company:

(1) Be of legal majority age.

(2) Be a citizen of the United States or a resident alien.

(3) Not have been convicted in any jurisdiction of any felony or of any crime involving moral turpitude or illegally using or possessing a dangerous weapon, for any of which a full pardon (or similar relief) has not been granted.

(4) Not have been declared by any court of competent jurisdiction incompetent by reason of mental defect or disease and has not been restored.

(5) Not be suffering from habitual drunkenness or from narcotic addiction or dependence.

(6) Be of good moral character.

(7) Possess three years' experience as a manager, supervisor, or administrator with a contract security company or proprietary security organization or possess three years' supervisory experience approved by the licensing authority with any federal, U.S. military, state, county, or municipal law enforcement agency.

(b) If the licensing authority determines that the applicant or qualifying agent has not satisfactorily complied with subsection (a)(7) of this section, it may require compliance with subsection (c) of this section.

(c) The licensing authority shall prepare and administer at least twice annually examinations designed to measure an individual's knowledge and competence in the contract security company business. An applicant or qualifying agent successfully passing the licensing authority's examination may substitute that for the experience requirement of subsection (a)(7) of this section.

Section 16. [*License Application—Investigation.*] After receipt of an application for a license, the licensing authority shall conduct an investigation to determine whether the facts set forth in the application are true and shall compare, or request that [the appropriate state agency] compare the fingerprints submitted with the application to fingerprints filed with [the division of criminal identification, records and statistics of the state department of corrections or its equivalent]. The licensing agency [or the state agency comparing the fingerprints] shall also submit the fingerprints to the Federal Bureau of Investigation for a search of the fingerprint files of that agency to determine if the individual fingerprinted has any convictions recorded in the FBI files.

Section 17. [*Action on License Application.*] Within 30 days after receipt of an application, the licensing authority shall either issue a license to the applicant or notify the applicant of a denial of the license application. In the event that additional information is required from the applicant by the licensing authority to complete its investigation or otherwise to satisfy the requirements of this act, or if the applicant has not submitted all of the required information, the 30-day period for action by the licensing authority shall commence when all such information has been received by the licensing authority.

Section 18. [*Grounds for Denial of Application.*] The licensing authority shall deny the application for a license if it finds that the applicant or the qualifying agent or any of the applicant's owners, partners, or principal corporate officers have:

(1) Violated any of the provisions of this act or the rules and regulations promulgated hereunder.

(2) Practiced fraud, deceit, or misrepresentation.

(3) Knowingly made a material misstatement in the application for a license.

(4) Have not met the qualifications of Section 15(a).

Section 19. [*Procedure for Approval or Denial of Application; Hearings.*]

(a) The procedure of the licensing authority in approving or denying an application shall be as follows:

(1) If the application is approved, the licensing authority shall notify the applicant in writing that a license will be issued. Such notification shall state that the license issued will expire in two years, unless renewed in accordance with Sections 20 and 21 of this act, and shall set forth the time within which application for renewal must be made.

(2) If the application is denied, the licensing authority shall notify the applicant in writing and shall set forth the grounds for denial. If the grounds for denial are subject to correction by the applicant, the notice of denial shall so state and the applicant shall be given 10 days after receipt of such notice or, upon application, a reasonable additional period of time within which to make the required correction.

(b) If the application is denied, the applicant may within 30 days after receipt of notice of denial from the licensing authority request a hearing on the denial. Within 10 days after the filing of such request for hearing by the applicant, the licensing authority shall schedule a hearing to be held before the licensing authority after due notice to the applicant. The hearing shall be held within 15 days after such notice is mailed to the applicant, unless postponed at the request of the applicant. The applicant shall have the right to make an oral presentation at the hearing, including the right to present witnesses and to confront and cross-examine adverse witnesses. The applicant may be represented by counsel. If the hearing is before a hearing officer, the officer shall submit his report in writing to the licensing authority within 10 days after the hearing. The licensing authority shall issue its decisions within 10 days after the hearing or within 10 days after receiving the report of the hearing officer. The decision of the licensing authority shall be in writing and set forth the licensing authority's findings and conclusions. A copy shall be promptly mailed to the principal office of the applicant in the State.

Section 20. [*Renewal of License.*] Each license shall expire two years after its date of issuance. Application for renewal of a license must be received by the licensing authority on a form provided by the licensing authority not less than 30 days prior to the expiration date of the license, subject to the right of the licensing authority to refuse to renew a license for any of the grounds set forth in Section 24(a), and it shall promptly notify the licensee of its intent to refuse to renew the license. The licensee may, within 15 days after receipt of the notice of intent to refuse to renew a license, request a hearing on the refusal in the manner prescribed by Section 24(b). A licensee shall be permitted to continue to engage in the contract security company business while the renewal application is pending.

Section 21. [*Application, License, and Renewal Fees.*]

(a) A nonrefundable application fee of [$500] shall be remitted with each initial license application.

(b) A fee of [$250], refundable in the event the license renewal is denied, shall be remitted with each application for renewal of a license.

Section 22. [*Form of License.*] The license, when issued, shall be in a form prescribed by the licensing authority and shall include:

(1) The name of the licensee.

(2) The business name under which the licensee is to operate.

(3) The addresses of the locations where the licensee is authorized to operate.

(4) The number and date of the license and its date of expiration.

Section 23. [*License—Transferability.*]

(a) No license issued pursuant to the provisions of this act shall be assigned or transferred, either by operation of law or otherwise.

(b) If the license is held by an owner who is not already a licensee, other than a corporation, and such owner shall die, become disabled, or otherwise cease to engage in the business, the successor, heir, devisee, or personal representative of the owner shall, within 30 days of the death, disablement, or other termination of operation by the original licensee, apply for a license on a form prescribed by the licensing authority, which form shall include the same general information required by Section 14 of this act. The transfers shall be subject to the same general requirements and procedures set forth in Sections 15 through 20 to the extent such sections are applicable.

(c) If a sale, assignment, transfer, merger, or consolidation of a business licensed under this act is consummated, the purchaser, assignee, transferee, surviving, or new corporation not already a licensee shall immediately apply for a license on a form prescribed by the licensing authority which shall include the general information required by Section 14. The purchaser, assignee, transferee, surviving, or new corporation shall be subject to the same general requirements and procedures set forth in Sections 15 through 20 to the extent that such sections are applicable and may continue the operation of that licensed business until notified by the licensing authority of its final decision on the new application for a license.

(d) With good cause, the licensing authority may extend the period of time for filing the application required by subsections (b) and (c) of this section.

Section 24. [*Licenses—Revocation; Hearings; Appeals; Notices.*]

(a) Licenses may be revoked by the licensing authority in the manner hereinafter set forth if the licensee or any of its owners, partners, principal corporate officers, or qualifying agent are found to have:

(1) Violated any of the provisions of this act or any rule or regulation of the licensing authority which violation the licensing authority determines to reflect unfavorably upon the fitness of the licensee to engage in the contract security company business.

(2) Knowingly and willfully given any false information of a material nature in connection with an application for a license or a renewal or reinstatement of a license or in a notice of transfer of a business licensed under this act.

(3) Been convicted in any jurisdiction of a felony or a misdemeanor

if the licensing authority determines that such conviction reflects unfavorably on the fitness of the applicant to engage in the contract security company business.

(4) Committed any act while the license was not in effect which would have been cause for the revocation of a license or grounds for the denial of an application for a license.

(b) Prior to revocation of a license, the licensing authority shall promptly notify the licensee of its intent to issue an order of revocation, setting forth in reasonable detail the grounds for revocation. Within 30 days of receipt of notice of intent to revoke from the licensing authority, the licensee may request a hearing. Within 10 days after the filing of a request for hearing by the licensee, the licensing authority shall, upon due notice to the licensee, schedule a hearing to be held before the licensing authority or an officer designated by the licensing authority. The hearing shall be held within 15 days after the notice is mailed to the licensee, unless postponed at the request of the licensee. The licensee shall have the right to make an oral presentation at the hearing, including the right to present witnesses and to confront and cross-examine adverse witnesses. The licensee may be represented by counsel. If the hearing is held before a hearing officer, the officer shall submit his report in writing to the licensing authority within 10 days after the hearing. The licensing authority shall issue its decision within 10 days after the hearing or within 10 days after receiving the report of the hearing officer. The decision of the licensing authority shall be in writing and set forth the licensing authority's findings and conclusions. A copy shall be promptly mailed to the principal office of the licensee in the State.

(c) Within 90 days after the licensee has exhausted all rights of appeal under this act or if the licensee does not seek a hearing after receipt of a notice of intent to revoke, the licensee shall notify all of its clients in the State of the revocation and maintain in its records a copy of the notices. The licensee shall cease to perform any services for which it has been licensed under this act within 60 days of its receipt of the final notice of intent to revoke from the licensing authority.

(d) Under circumstances in which the licensing authority determines that the public health, welfare, or safety may be jeopardized by the termination of a licensee's services, the licensing authority may upon its own motion or upon application by the licensee or any party affected by such termination extend the time for the termination of the licensee's operations, subject to reasonable, necessary and proper conditions or restrictions it deems appropriate.

(e) After the licensing authority has issued a notice of intent to revoke a license, the licensee may request that it be permitted to continue to operate subject to the terms of a written order of consent issued by the licensing authority requiring the licensee to correct the conditions set forth as grounds for revocation in the notice of intent to revoke and imposing reasonable conditions and restrictions on the licensee in the conduct of its business. The licensing authority may grant or deny such a request and may stay or postpone any proceeding being conducted pursuant to subsection (b) of this section. Negotiations for an order of consent may be requested at any time during revocation proceedings and stay of pending proceedings during negotiations shall be within the sole discretion of the licensing authority. If revocation proceedings are before a court and the licensing authority and licensee have agreed upon the terms of a proposed consent order, the licensing authority shall submit the proposed order to the court which may approve or disapprove the proposed order or require modification of the proposed consent order before approval.

(f) The licensing authority shall enact reasonable rules and regulations for determination of whether a licensee has complied with a consent order issued pursuant to subsection (e) of this section. If the licensing authority determines that a licensee has failed to comply, it may revoke the order and conduct proceedings for revocation of the license. If the consent order has been approved by a court, the licensing authority shall petition the court for vacation of the order. The court shall hold a hearing to determine if the order should be vacated. If the court vacates the consent order, the licensing authority may initiate proceedings for revocation of the license.

Section 25. [*Posting and Surrender of License Certificate.*]

(a) Within 72 hours after receipt of the license certificate, the licensee shall post and display the license certificate at all times in a conspicuous place in his principal office in the State and copies thereof to be displayed at all times in any other offices within the State where the licensee transacts business with its customers so that all persons visiting such place or places may readily see the license. Such license certificates or copies thereof shall be subject to inspection at all reasonable times by the licensing authority.

(b) It shall be unlawful for any person holding a license certificate to knowingly and willfully post the license certificate or permit it to be posted upon premises other than those described in the license certificate or to knowingly and willfully alter the license certificate. Each license certificate shall be surrendered to the licensing authority within 72 hours after it has been revoked or after the licensee ceases to do business, subject, however, to Section 24(d) and (e). If, however, the licensing authority or a court of competent jurisdiction has pending before it any matter relating to the renewal, revocation, or transfer of a license, the licensee shall not be required to surrender the license until the matter has been adjudicated and all appeals have been exhausted. When the licensee receives final notice that his license has been revoked, a copy of the notice shall be displayed and posted in close proximity to the license certificate until the licensee terminates his operations.

Section 26. [*Change in Status of Licensee.*] The licensee shall notify

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the licensing authority within 30 days of any change in its officers, directors, or material change in the information previously furnished or required to be furnished to the licensing authority or any occurrence which could reasonably be expected to affect the licensee's right to a license under this statute.

Section 27. [*Application for Registration.*]

(a) Except as otherwise provided in this act, no person shall perform the functions and duties of an armed private security officer in the State without first having been registered with the licensing authority and issued a registration card in the manner prescribed in the statute.

(b) Individuals required to obtain a registration card under this section shall file for a registration card and, upon completion thereof, the licensee or registrant shall immediately forward the application to the licensing authority.

(c) Every applicant for a registration card shall make and deliver to the licensee or the licensing authority a sworn application in writing upon a form prescribed by the licensing authority containing the following information:

(1) The name and address of the person which employs or will employ the applicant.

(2) Applicant's full name and current residence address.

(3) Date and place of birth.

(4) Social Security number.

(5) Telephone number, if any.

(6) Complete addresses for the past five years.

(7) List of all employers for the past five years.

(8) List of all arrests, convictions, and pending criminal charges in any jurisdiction.

(9) Type of military discharge.

(10) General physical description.

(11) All names used by the applicant other than the name by which the individual is currently known, with an explanation setting forth the place or places where each name was used, the date or dates of each use, and an explanation of why the names were used.

(12) Two sets of classifiable fingerprints recorded in the manner as may be prescribed by the licensing authority.

(13) Two recent color photographs.

(14) A statement whether the applicant has ever been denied a registration card and whether the card has been revoked or suspended in any jurisdiction.

(15) A statement that the applicant will notify the licensing authority of any material changes of information set forth in the application within 10 days after the change.

(16) A statement that the applicant does not suffer from habitual drunkenness or from narcotic addiction or dependence and does not

possess any disability which would prevent him from performing the duties of an armed private security officer.

(17) A statement from a certified trainer to the effect that the applicant has completed the training required by Section 36(a) and (b).

(d) To be eligible to apply for a registration card an individual must:

(1) Be of legal majority age.

(2) Be a citizen of the United States or a resident alien.

(3) Not have been convicted in any jurisdiction of any felony or of any crime involving moral turpitude or illegally using or possessing a dangerous weapon, for any of which a full pardon (or similar relief) has not been granted.

(4) Not have been declared by any court of competent jurisdiction incompetent by reason of mental disease or defect and has not been restored.

(5) Not suffer from habitual drunkenness or from narcotic addiction or dependence.

(6) Be of good moral character.

(7) Not possess any disability which in the opinion of the licensing authority prevents him from performing the duties of an armed private security officer.

(e) The registration card shall be carried by an individual required to be registered under this act whenever such individual is performing the duties of an armed private security officer and shall be exhibited upon request.

(f) Application for a registration card to the licensing authority shall be accompanied by a [$15] fee.

(g) A registration card shall entitle the registrant to perform the duties of an armed private security officer provided the registrant continues in the employ of the employer listed on the card and maintains his eligibility to hold a registration card under the provisions of this act.

Section 28. [*Registration Card—Investigation.*] After receipt of an application for a registration card, the licensing authority shall conduct an investigation to determine whether the facts set forth in the application are true and shall cause the applicant's fingerprints to be compared with fingerprints filed with [the State's department or agency maintaining criminal history records]. The licensing authority or that agency shall within five days forward a copy of the fingerprint card of the applicant to the Federal Bureau of Investigation and request a search of the fingerprint files of the FBI for any record of convictions of the registration card applicant.

Section 29. [*Action on Registration Card Application.*] Action to approve or deny an application of an individual for a registration card shall be taken as expeditiously as possible by the licensing authority but the action shall be completed within 30 days after receipt of the application unless the licensing authority shall require additional information from the applicant. In that event or if additional facts are required to satisfy the requirements of this act, or if the applicant has not submitted all the information required, the period for the action by the licensing authority shall commence when all information has been received by the licensing authority. Upon acceptance of a registrant's application, the licensing authority shall enter the registrant on its permanent register and issue to the registrant a permanent registration card which shall be valid for one year.

Section 30. [*Registration Cards—Denial, Suspension or Revocation; Hearings, Notices.*]

(a) Registration cards shall be denied, suspended, or revoked by the licensing authority in the manner hereinafter set forth if the cardholder has:

(1) Failed to meet the qualifications of Section 27(d).

(2) Been found to have violated any of the provisions of this act or any rule or regulation of the licensing authority if the licensing authority determines that the violation reflects unfavorably upon the fitness of the registrant to function as an armed private security officer.

(3) Knowingly and willfully giving any material false information to the licensing authority in connection with an application for a registration card or a renewal or reinstatement of a registration card or in the submission of any material fact to the licensing authority.

(4) Been convicted in any jurisdiction of a felony, a crime involving moral turpitude, or illegally using or possessing a dangerous weapon, for any of which a full pardon (or similar relief) has not been granted.

(b) Prior to denial, suspension, or revocation of a registration card, the licensing authority shall promptly notify the registrant and the employer with whom the cardholder is employed of the proposed action setting forth in reasonable detail the grounds for denial, suspension, or revocation. The registrant may request a hearing in the same manner and in accordance with the same procedures as that provided in Section 24(b).

(c) In the event that the licensing authority denies, suspends, or revokes a registration card, the cardholder, upon receipt of the notice of denial, suspension, or revocation, shall immediately cease to perform the duties of an armed private security officer.

(d) Both the cardholder and the employer shall be notified by the licensing authority of final action to deny, suspend, or revoke a registration card.

Section 31. [*Renewal of Registration Card—Notification of Changes.*]

(a) Registration cards issued by the licensing authority shall be valid for a period of one year. A registration card renewal form must be filed by the cardholder with the licensing authority not less than 30 days prior to the expiration of the card. The fee for renewal of the card shall be [$5]. The renewal application shall include a statement by the registrant that the registrant continues to meet the qualifications for an armed private security officer as set forth in Section 27(c). The renewal application shall be accompanied by a statement from a certified trainer that the registrant has satisfactorily completed the prescribed refresher training required by Section 36. A renewed registration card shall be valid for one year.

(b) The licensing authority may refuse to renew a registration card for any of the grounds set forth in Section 27(d) and it shall promptly notify the cardholder of its intent to refuse to renew the license. The cardholder may, within 15 days after receipt of the notice, request a hearing on the refusal in the same manner and in accordance with the same procedure as that provided in Section 24(b).

(c) Licensees and employers subject to this act shall notify the licensing authority within 10 days after the death or termination of employment of any of its employees who are registrants.

(d) Licensees and employers subject to this act shall immediately notify the licensing authority upon receipt of information relating to a registrant's continuing eligibility to hold a card under the provisions of this act.

Section 32. [*Transferability of Registration Cards.*]

(a) In the event that a registrant terminates employment with one employer and is reemployed within five business days as an armed private security officer with another employer, the registrant shall within 24 hours of reemployment submit to the licensing authority a notice of the change on a form prescribed by the licensing authority, together with a transfer fee of [$5]. The licensing authority shall issue a new registration card reflecting the name of the new employer. Upon receipt of the new card, the registrant must immediately return the old card to the licensing authority. The registrant may continue to work as an armed private security officer for the new employer while the licensing authority is processing the application.

(b) A registrant who terminates employment and who is not reemployed as an armed private security officer within five business days shall, within 24 hours of the fifth business day, surrender the registration card to the employer. The employer shall return the cancelled registration card to the licensing authority within five business days by placing it in the U.S. mail addressed to the licensing authority. If the registrant fails to surrender the card as required by this subsection, the employer shall notify the licensing authority of that fact within 10 business days after the registrant terminated employment.

(c) Any individual who changes his permanent residence to this State from any other State which the licensing authority determines has selection, training, and all other similar requirements at least equal to those required by this act, and who holds a valid registration, commission, identification, or similar card issued by that State through a licensee which is licensed by that State and who wishes to continue to be employed by that licensee, may apply for a registration card on a form prescribed by the licensing authority upon payment of a processing fee of [$5] and certification by the licensee that the individual has completed the training prescribed by that State. The licensing authority shall issue the individual a registration card.

(d) A registration card issued by any other State of the United States shall be valid in this State for a period of 90 days, provided the registrant is on temporary assignment for the employer shown on his registration card.

Section 33. [*Expiration and Renewal during Suspension of Use of a Registration Card.*] A registration card shall be subject to expiration and renewal during the period in which the holder of the card is subject to an order of suspension.

Section 34. [*Activities of Registrants during Suspension of Use of a Registration Card.*] After a registrant has received a notice of suspension or revocation of his registration card, the individual shall not perform the duties of an armed private security officer unless specifically authorized to do so by order of the licensing authority or by [a court of competent jurisdiction within the State].

Section 35. [*Firearms.*]

(a) It shall be unlawful for any person performing the duties of an armed private security officer to carry a firearm in the performance of those duties without having first been issued a registration card by the licensing authority.

(b) A registration card will grant authority to the holder, while in the performance of his duties, to carry a standard police .38 caliber handgun or any other firearm approved by the licensing authority not otherwise prohibited by any state law and with which the registrant has met the training requirements of Section 36. The use of any firearm not approved by the licensing authority is prohibited.

(c) The registrant must be in possession of the registration card when carrying a firearm and shall exhibit it upon request. Registration cards shall authorize possession of an approved firearm only when the registrant is on duty or traveling directly to and from work.

(d) All firearms carried by authorized armed private security officers in the performance of their duties shall be owned by the employer and, if required by law, shall be fully registered with the proper agency or government. Personally owned weapons will not be carried by armed private security officers in the performance of their duties.

Section 36. [*Armed Private Security Officer Training Requirements.*]

(a) Prior to being issued a registration card, all armed private security officers shall receive at least eight hours of general training as prescribed by the licensing authority and be required to successfully pass an examination on the prescribed material which includes the following topics:

(1) Orientation: two hours.

(2) Legal powers and limitations of a security officer: two hours.

(3) Emergency procedures: two hours.

(4) General duties: two hours.

(b) All armed private security officers shall also receive firearms training before being issued a firearm. The following minimum firearms preassignment training shall be required:

(1) Pre-issue weapon instruction and successful examination, including the following topics:

(i) Legal limitations on use of weapons.

(ii) Handling of a weapon.

(iii) Safety and maintenance.

(2) Minimum marksmanship qualification requirement: a minimum of 60 percent on any approved silhouette target course prescribed by the licensing authority.

(c) All armed private security officers must complete an annual eight-hour refresher course in the subjects prescribed by subsection (a) of this section and be requalified in the use of firearms prior to applying for a renewal registration card under the provisions of Section 31.

(d) Upon a registrant's completion of any training required in this section, the licensee, registrant, or employer shall furnish to the licensing authority a written notice of such completion signed by a certified trainer.

(e) All training required by this act shall be administered by a certified trainer who is approved by the licensing authority and meets the following minimum qualifications:

(1) Is of legal majority age.

(2) Has a minimum of one year supervisory experience with a contract security company, proprietary security organization, or with any federal, U.S. military, state, county, or municipal law enforcement agency.

(3) Is personally qualified to teach the training required by this act.

(f) The certified trainer may, at his discretion, instruct personally or use a combination of personal instruction, audio, and/or visual training aids. The certified trainer shall have authority to appoint one or more instructors to assist in the implementation of the training program.

Section 37. [*Employment by Nonlicensees.*] It is unlawful, as provided in Section 42, for any person, other than a licensee, to employ an armed private security officer unless prior to employment that person shall notify the licensing authority on a form prescribed by the licensing authority of his intent to employ an armed private security officer; designate an individual who will be responsible for the compliance with the applicable provisions of this act on behalf of the officer; furnish the licensing authority with evidence of insurance required by Section 41; and furnish other information as the licensing authority may require.

Section 38. [*Fingerprinting and Application.*]

(a) Except as otherwise provided in this act, no person shall perform the duties of an unarmed private security officer without having first submitted two sets of classifiable fingerprints to his employer and having completed an employment application on a form approved by the licensing authority.

(b) On or before the date an unarmed private security officer begins employment, the employer must submit the employee's fingerprints and the application to the licensing authority. The licensing authority shall compare or request that [the appropriate state agency] compare the fingerprints filed with the application to fingerprints filed with [the division of criminal identification, records and statistics of the state department of corrections, or its equivalent]. The licensing authority [or the state agency comparing the fingerprints] shall also submit the fingerprints to the Federal Bureau of Investigation for a search of the fingerprint files of that agency.

(c) The application for an identification card shall be accompanied by a [$5] fee.

(d) Within 30 days after an employment application and fingerprints have been submitted by an employer, the licensing authority shall inform the employer of any criminal conviction data resulting from the records search.

(e) No person may employ an individual as an unarmed private security officer if the individual has been convicted in any jurisdiction of any felony or of any crime involving moral turpitude or illegally using or possessing a dangerous weapon, for any of which a full pardon (or similar relief) has not been granted.

Section 39. [*Identification Card.*]

(a) The licensing authority shall issue an identification card for every individual who has been subjected to a criminal history records check and does not have a conviction for a felony or any crime as stated in Section 38(d). The identification card will be sent to the employer submitting the fingerprint records and the card will then be issued to the employee if he is still employed. Identification cards issued by the licensing authority under this subsection shall be carried by that individual while performing his duties and shall be exhibited upon request.

(b) In the event that a holder of an identification card terminates employment with one employer and is reemployed within five business days as an unarmed private security officer with another employer, the holder shall within 24 hours of such reemployment submit to the licensing authority a notice of the change on a form prescribed by the licensing authority together with a transfer fee of [$5]. The licensing authority shall issue a new identification card reflecting the name of the new employer. Upon receipt of that new card, the holder must immediately return the old card to the licensing authority. The holder may continue to work as an unarmed private security officer for the new employer while the licensing authority is processing the application.

(c) The holder of an identification card who terminates employment and who is not reemployed as an unarmed private security officer within five business days shall, within 24 hours of the fifth business day, surrender the identification card to the employer. The employer shall return the cancelled identification card to the licensing authority within five business days by placing the card in the U.S. mail addressed to the licensing authority. If the holder fails to surrender the card as required by this subsection, the employer shall notify the licensing authority of that fact within 10 business days after the holder has terminated employment.

Section 40. [*Uniforms and Equipment*.]

(a) No individual, while performing the duties of an armed or unarmed private security officer, shall wear or display any badge, insignia, device, shield, patch or pattern which shall indicate or tend to indicate that he is a sworn peace officer or which contains or includes the word "police" or the equivalent thereof, or is similar in wording to any law enforcement agency in this State.

(b) No person, while performing any private security services, shall have or utilize any vehicle or equipment displaying the words "police," "law enforcement officer," or the equivalent thereof, or have any sign, shield, marking, accessory, or insignia that may indicate that such vehicle is a vehicle of a public law enforcement agency.

(c) If a private security officer is required to wear a uniform, it shall be furnished by the employer. All military or police-style uniforms, except for rainwear or other foul weather clothing, shall have affixed:

(1) Over the left breast pocket on the outermost garment and on all caps worn by such persons, badges, distinct in design from those utilized by law enforcement agencies within the State and approved by the licensing authority.

(2) Over the right breast pocket on the outermost garment a plate or tape of the size 5" x 1" with the words "Security Officer."

(d) An employer may require a reasonable deposit to secure the return of the uniform, weapon, or any equipment provided by the employer.

Section 41. [*Insurance Requirements*.] All licensees and employers of armed private security officers shall file with the licensing authority a certificate of insurance evidencing comprehensive general liability coverage for bodily injury, personal injury, and property damage with endorsements for assault and battery and personal injury, including false arrest, libel, slander, and invasion of privacy in the amount of [$3,000] for bodily or personal injury and [$100,000] for property damage. Licensees shall also file endorsements for damage to property in their care, custody, and control, and for errors and omissions. Licensees and employers of armed private security officers shall also file a certificate of Workmen's Compensation Insurance as required by the statutes of this State. The certificates shall provide that the insurance shall not be modified or cancelled unless 10 days' prior notice shall be given to the licensing authority. All persons required to be insured by this act must be insured by a carrier licensed in the State in which the insurance has been purchased or in this State.

Section 42. [*Unlawful Acts.*]

(a) It is unlawful for any person to knowingly commit any of the following:

(1) Provide contract security services without possessing a valid license.

(2) Employ any individual to perform the duties of an armed private security officer who is not the holder of a valid registration card or to employ any individual to perform the duties of an unarmed private security officer who has not filed an application for an identification card as required by Section 38.

(3) Publish any advertisement, letterhead, circular, statement, or phrase of any sort which suggests that the licensee is an official police agency or any other agency, instrumentality, or division of this State or any of its political subdivisions or of the federal government.

(4) Issue any badge or shield not in conformance with this act.

(5) Designate an individual as other than a private security officer.

(6) Knowingly make any false statement or material omission in any application filed with the licensing authority.

(7) Falsely represent that the person is the holder of a valid license or registration.

(8) Violate any provision of this act or any rule or regulation of the licensing authority.

(b) It is unlawful for any private security officer to knowingly commit any of the following:

(1) Fail to return immediately on demand or within 24 hours of termination of employment a firearm issued by an employer. Violation of this provision shall constitute a felony.

(2) To carry a firearm in the performance of his duties if not the holder of a valid registration card. Violation of this provision will constitute a felony.

(3) Fail to return immediately on demand or within seven days of termination of employment any uniform, badge, or other item of equipment issued to the private security officer by an employer.

(4) Make any statement which would reasonably cause another person to believe that the private security officer functions as a sworn

peace officer or other official of this State or of any of its political subdivisions or agency of the federal government.

(5) Fail to comply with the regulations issued by the licensing authority or with any other requirements under the provisions of this act.

(6) Divulge to anyone other than his employer or to such persons as his employer may direct as may be required by law any information acquired during such employment that may compromise the security of any premises to which he shall have been assigned by the employer.

(7) Fail to return to the employer or the licensing authority a registration card or identification card as required by the provisions of this act.

(8) Possess a license, registration card, or identification card issued to another person.

(9) Use any badge or shield not in conformance with this act.

(c) The violation of any of the provisions of this section, unless otherwise specified, shall constitute a misdemeanor punishable by a fine of not more than [$1,000] or up to one year of imprisonment, or both. The licensing authority is also authorized to suspend or revoke a license, registration card, or identification card issued under this act.

Section 43. [*Sworn Police Officer.*] Any individual who is regularly employed as a sworn police officer and who also is employed as an armed or unarmed private security officer must comply with the requirements of this act.

Section 44. [*Fees and Deposits.*] Any fees payable by a registrant under this act and paid by a licensee on the registrant's behalf, or any deposits which may be required by licensee from a registrant under this act, may be deducted from any wages payable to the registrant by the licensee, provided that such deduction does not reduce the hourly wage below the applicable minimum wage law.

Section 45. [*Local Government Regulation of Contract Security Companies or Private Security Officers.*]

(a) From and after the effective date of this act, no governmental subdivision of this State shall enact any legislation, code, or ordinance, or promulgate any rules or regulations relating to the licensing, training, or regulation of contract security companies or individuals functioning as private security officers, armed or unarmed, other than the imposition of a bona fide business tax.

(b) Upon the effective date of this act, any provision of any legislation, code, or ordinance, or rules promulgated by any local governmental subdivision of this State relating to the licensing, training, or regulation of contract security companies or individuals functioning as private security officers, armed or unarmed, shall be deemed superseded by this act.

Section 46. [*Judicial Review.*]

(a) Any person aggrieved by any final action of the licensing authority under this act shall have the right to judicial review by [a court of competent jurisdiction] within the State.

(b) In proceedings in any court pursuant to the provisions of this act, trial shall be de novo. When a court has acquired jurisdiction, all administrative action taken prior thereto shall be stayed, except as provided in Section 34. The rights of the parties shall be determined by the court upon a trial of the matter or matters in controversy under rules governing the trial of other civil suits in the same manner and to the same extent as if the matter had been committed to the court in the first instance and there had been no intervening administrative or executive action or decision.

Section 47. [*Reciprocity.*] Full reciprocity shall be accorded to armed and unarmed private security officers who are properly registered and certified in another State having selection and training requirements at least equal to the requirements of this State when the duties of these individuals require them to operate across state lines.

Section 48. [*Severability.*] [Insert severability clause.]

Section 49. [*Repeal.*] [Insert repealer clause.]

Section 50. [*Effective Date.*] [Insert effective date.]

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STATE SUPREME COURTS AND THE U.S. SUPREME COURT'S POST-MIRANDA RULINGS

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I. Introduction

In 1966 the United States Supreme Court under Chief Justice Warren issued the *Miranda v. Arizona*[1] ruling. In 1971 the "new" Supreme Court under Chief Justice Burger issued the first in a series of rulings which chipped away at *Miranda*.[2] Since then many commentators have speculated about the future of *Miranda* and have concluded that the future looks dim.[3] Even the more cautious legal journals have reached similar conclusions.[4] Some have predicted that the Burger Court will continue to undermine the substance of the decision, though perhaps not actually overrule it,[5] while another has predicted that the Court "will assuredly overrule it within the near future."[6]

The purpose of this article is not to analyze the rulings and add another prediction to the list but to examine systematically the reaction of state supreme courts to the rulings in order to determine whether these courts have eroded the *Miranda* principles by failing to require strict adherence to them. It is assumed that the state supreme court judges, like the commentators, saw the apparent handwriting on the

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[1] 384 U.S. 436 (1966).

[2] Harris v. New York, 401 U.S. 222 (1971). Commentators consider the Burger Court to have begun with Burger's appointment, though by the time of this decision President Nixon had made Justice Blackmun's appointment also.

[3] *Trimming Miranda*, Time, June 24, 1974, at 64; Berlow, *Undercutting Miranda: The Burger Court Way With Suspects*, 224 Nation 498 (1976).

[4] Ghetti, *Criminal Procedure—Admissibility of Confessions—Dancing on the Grave of Miranda?*, 10 Suffolk U.L. Rev. 1141 (1976); Pelander, *Michigan v. Tucker: A Warning About Miranda*, 17 Ariz. L. Rev. 188 (1975); Stone, *The Miranda Doctrine in the Burger Court*, 1977 The Sup. Ct. Rev. 99; Note, *U.S. v. Crocker—Setting the Stage for Miranda's Last Act?*, 47 U. Colo. L. Rev. 279 (1976). For a less pessimistic analysis, see Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1320 (1977).

[5] Pelander, *supra* note 4; Stone, *supra* note 4.

[6] Ghetti, *supra* note 4, at 1178.

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wall and anticipated a continuous chipping away at the *Miranda* principles[7] by the Burger Court. It is hypothesized that these judges took the opportunity to erode the *Miranda* principles and, in fact, eroded them even more than the Burger Court had already done.

Social scientists have used three models to characterize the relationship between the Supreme Court and the lower federal and state courts. The "hierarchical model" analogizes the judicial system to a pyramid, with the Supreme Court at the pinnacle. According to this model, the Court establishes important policy, and the lower courts implement the policy automatically.[8] The "bureaucratic model" also analogizes the judicial system to a pyramid, with the Supreme Court at the pinnacle. But, according to this model, while the Court establishes important policy, the lower courts do not implement the policy automatically. Rather, they impose bureaucratic constraints, such as inefficiency and recalcitrance, upon the Court.[9] The "interaction model" does not analogize the judicial system to a pyramid at all. Instead, according to this model, the Court establishes some important policy. However, since the Court hears relatively few cases, it must allow the lower courts to formulate key policy as well. Furthermore, the Court, by necessity, allows the lower courts to evade some of its rulings.[10]

Social scientists have assessed the usefulness of these three models by engaging in a variety of research. The most popular research has been on the impact of judicial decisions.[11] Initially this research focused on the impact of the Supreme Court's race relations decisions. Prompted by the resistance to the Court's *Brown v. Board of Education*[12] decision, social scientists tried to determine the extent to which resistance to the decision resulted in noncompliance with it.[13] Later, researchers focused on the impact of the Court's decisions in other areas. Foremost among these other areas is that of criminal rights. Social scientists tried to determine the extent to which the Court's *Mapp v. Ohio*,[14] *Escobedo v. Illinois*,[15] *Miranda*, and *In re Gault*[16] decisions resulted in noncompliance by the lower state courts.[17] They found that many of the courts were reluctant to relinquish their traditional, conservative policies concerning the exclusionary rule, confessions, and juvenile rights, even in the face of the Supreme Court's demands that the courts adopt its more liberal policies. Consequently, researchers concluded that these decisions resulted in substantial noncompliance.

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[7] A survey of prosecutors found that they saw the apparent handwriting on the wall. Gruhl & Spohn, *The Supreme Court's Post-Miranda Rulings: Impact on Local Prosecutors*, 3 Law & Policy Q. 29 (1981). So, presumably, judges did too.

[8] J. Frank, Courts on Trial: Myth and Reality in American Justice 222 (1963).

[9] W. Murphy, Elements of Judicial Strategy (1964); J. Peltason, Federal Courts in the Political Process (1955); M. Shapiro, The Supreme Court and Administrative Agencies (1968); Murphy, *Lower Court Checks on Supreme Court Power*, 53 Am. Political Science Rev. 1017 (1959); Murphy, *Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration*, 24 J. of Pol. 453 (1962); Shapiro, *Appeal*, 14 Law & Soc'y Rev. 629 (1980).

[10] K. Dolbeare, Trial Courts in Urban Politics: State Court Policy Impact and Functions in a Local Political System (1967); K. Vines and R. Richardson, The Politics of Federal Courts: Lower Courts in the United States (1970); Dolbeare, *The Federal District Courts and Urban Public Policy: An Exploratory Study*, in Frontiers of Judicial Research 373 (J. Grossman & J. Tanenhaus eds. 1969); Howard, *Litigation Flow in Three United States Courts of Appeals*, 8 Law & Soc'y Rev. 33 (1973); Vines, *The Role of Circuit Courts of Appeals in the Federal Judicial Process: A Case Study*, 7 Midwest J. of Political Science 305 (1963).

[11] The Impact of Supreme Court Decisions (T. Becker & M. Feeley eds. 2d ed. 1973); S. Wasby, The Impact of the United States Supreme Court: Some Perspectives (1970).

[12] 347 U.S. 483 (1954).

Nevertheless, *Miranda* eventually resulted in general compliance.[18] Romans[19] compared compliance with *Escobedo* and *Miranda* by state supreme courts. He found little compliance with *Escobedo* but considerable compliance with *Miranda*. He explained this difference by observing that *Escobedo*, though unquestionably liberal in direction, was not particularly clear in specifics, thereby providing lower courts with an opportunity to evade it.[20] In contrast, *Miranda* was clear, and did not provide lower courts with an opportunity to evade the decision.[21] In addition, this difference in compliance could have been explained by noting that *Miranda* was the second major case in this line of decisions involving confessions. As such, it signaled the Court's intention to make policy in this area and, correspondingly, it warned the lower courts not to try to evade it.[22]

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[13] J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. OF POL. 337 (1964).

[14] 367 U.S. 643 (1961).

[15] 378 U.S. 478 (1964).

[16] 387 U.S. 1 (1967).

[17] For *Mapp*—Manwaring, *The Impact of Mapp v. Ohio*, in THE SUPREME COURT AS POLICY-MAKER: THREE STUDIES ON THE IMPACT OF JUDICIAL DECISIONS 1 (D. Everson ed. 1968); Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC'Y REV. 109 (1973); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57 (1977); M. Ban, Local Courts Versus the Supreme Court: the Impact of Mapp v. Ohio (unpublished convention paper, American Political Science Association 1973). For *Escobedo* and *Miranda*—Kramer & Riga, *The New York Court of Appeals and the United States Supreme Court, 1960-76*, 8 PUBLIUS 75 (1978); Romans, *The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda and the Use of Judicial Impact Analysis*, 27 W. POLITICAL Q. 38 (1974). For *Gault*—Lefstein, Stapleton, & Teitelbaum, *In Search of Juvenile Justice: Gault and its Implementation*, 3 LAW & SOC'Y REV. 491 (1969).

[18] Here "noncompliance" is used generally to mean a failure to follow the Supreme Court's doctrine in similar, related cases. In the studies cited the term was operationalized specifically to categorize reactions to whatever doctrine was involved.

[19] Romans, *supra*, note 17.

[20] *Id.* at 42-51.

[21] *Id.* at 51-52, 58. In fact, one researcher interested in the comparative impact of clear and ambiguous decisions called Miranda "exceedingly clear." L. BERKSON, THE SUPREME COURT AND ITS PUBLICS: THE COMMUNICATION OF POLICY DECISIONS 47 (1978).

From this research on the impact of judicial decisions upon the lower courts, some conclusions and implications emerge. Lower courts often do not faithfully comply with the Supreme Court's doctrine. This has been especially true for its doctrine concerning criminal rights. The Court must establish clear doctrine and indicate its determination to get the lower courts to comply by issuing a series of decisions reinforcing its doctrine. Once the Court no longer indicates its determination to enforce a doctrine, the lower courts will sense less pressure from the Court to comply with it. Further, if the Court not only stops indicating its determination to enforce a doctrine, but actually exhibits an intention to erode it, the lower courts might erode the doctrine faster than the Court does by itself. Hence two hypotheses emerge: the lower courts eroded the *Miranda* doctrine and, in fact, eroded it further than the Burger Court itself already had done.

This article will evaluate these hypotheses by first discussing *Miranda* and the Burger Court's post-*Miranda* rulings and then comparing these rulings with state supreme court holdings in related cases.

II. *MIRANDA* AND THE BURGER COURT'S POST-*MIRANDA* RULINGS

Prior to 1964 courts generally used the "voluntariness" test to determine whether confessions could be admitted as evidence at trial. This test asked, simply, whether the confessions were voluntary, given the totality of the circumstances involved. Obviously, this test was highly subjective.[23] In 1964, the Court moved away from the voluntariness test by proposing objective criteria to determine whether confessions could be admitted. In *Escobedo v. Illinois*, it held that police must inform suspects, before interrogation, that they have the right to remain silent. Also, it held that police must allow suspects to consult with their attorney. Otherwise, the confessions would be presumed to have been coerced.[24] In 1966, the *Miranda* Court reaffirmed *Escobedo* and elaborated upon it. The Court held that police must inform suspects that they have the right to remain silent, that anything they say may be used against them, that they have the right to an attorney, and that if they cannot afford an attorney the court will appoint one for them. The Court stipulated that suspects may waive these rights if they do so knowingly, intelligently, and voluntarily, but that they may also reassert these rights at any later time.

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[22] Other research found the importance of a line of decisions to achieve compliance. Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POLITICAL Q. 502 (1980).

[23] However, the court did assume that delay between arrest and arraignment constituted coercion, and the Court held resulting confessions involuntary per se. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

[24] Foreshadowing *Escobedo*, the Court ruled that statements obtained from an indicted defendant who had counsel, but who did not have counsel with him when he made the statements, were inadmissible. Massiah v. United States, 377 U.S. 201 (1964).

In 1971, the Burger Court began to weaken *Miranda*. In *Harris v. New York*, Chief Justice Burger announced that prosecutors could use statements obtained in violation of *Miranda* to impeach defendants' credibility if the defendants testified inconsistently with the earlier statements. *Miranda* explicitly prohibited such use,[25] but Burger declared the prohibition mere dictum.[26] He said *Miranda* should not be used as a shield to commit perjury. Thus, the Court's attack on *Miranda* was evident.[27] As Stone comments, "*Harris* was an exercise of raw judicial power. . . ."[28] In 1974, the Court continued to weaken *Miranda*. In *Michigan v. Tucker*,[29] it decided that a prosecutor could use the fruits of an interrogation which occurred before *Miranda*, and was not in accordance with it, even though the trial actually took place after *Miranda*. A Warren Court precedent had applied the *Miranda* requirements to all trials, rather than interrogations, which occurred after *Miranda*.[30] But Justice Rehnquist said the police acted in good faith, by following the *Escobedo* requirements in effect at the time of the interrogation, and actually followed all but one of the *Miranda* requirements. The police had failed to advise the suspect that if he could not afford an attorney the court would appoint one for him. The Warren Court stressed that this is a critical component of the warnings.[31] But Rehnquist concluded that the defendant received a fair trial, if not a perfect one.[32]

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[25] "[S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." 384 U.S. at 477.

[26] "Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling." Harris v. New York, 401 U.S. at 224.

[27] One commentator notes, "[r]ightly or wrongly, *Miranda* was deliberately structured to canvass a wide range of problems, many of which were not directly raised by the cases before the Court. This approach was thought necessary in order to 'give concrete constitutional guidelines for law enforcement agencies and courts to follow.' 384 U.S. at 441-42. Thus, a technical reading of *Miranda*, such as that employed in *Harris*, would enable the Court to label many critical aspects of the decision mere dictum and therefore not 'controlling.'" Stone, *supra* note 4, at 107-08. Nevertheless, the Court has not used this means of undercutting *Miranda* since *Harris*. For other criticism, see Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

[28] Stone, *supra* note 4, at 114.

[29] 417 U.S. 433 (1974).

[30] Johnson v. New Jersey, 384 U.S. 719 (1966).

[31] "[I]t is necessary to warn him not only that he has the right to consult with an attorney,

In 1975, the Court further weakened *Miranda* in a pair of cases. In *Oregon v. Haas*[33] it reaffirmed *Harris*. And in *Michigan v. Mosley*,[34] the Court decided that a prosecutor could use statements obtained when police resumed interrogation of a suspect two hours after the suspect cut off the interrogation by asking for an attorney. The Warren Court had said that police must stop immediately if suspects ask for an attorney,[35] but did not say whether the police could resume the interrogation at a later time. If *Miranda* is read literally, the police could not resume the interrogation. In *Mosley*, however, Justice Stewart rejected this reading, arguing that it would "lead to absurd and unintended results."[36] He noted that the suspect was given another set of warnings, interrogated by another officer, and interrogated about another crime.[37] The Court concluded that the police were not trying to wear down the suspect's resistance.[38] Justice Brennan, with Justice Marshall, dissenting, maintained that the majority's decision was not merely a refinement of *Miranda* but another attack upon it.[39] Brennan stated that, "[t]oday's distortion of *Miranda*'s constitutional principles can be viewed only as yet another step in the erosion and, I suppose, ultimate overruling of *Miranda*'s enforcement of the privilege against self-incrimination."[40] Justice White reinforced this prediction. He said he expected the Court to return to the voluntariness test.[41]

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but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one." Miranda v. Arizona, 384 U.S. at 473.

[32] Michigan v. Tucker, 417 U.S. at 446.

[33] 420 U.S. 714 (1975).

[34] 423 U.S. 96 (1975).

[35] Miranda v. Arizona, 384 U.S. at 473-74.

[36] Michigan v. Mosley, 423 U.S. at 102.

[37] But both interrogations concerned the same robberies. The second interrogation additionally concerned a shooting which occurred during one of the robberies.

[38] 423 U.S. at 106.

[39] Brennan said that "renewed questioning itself is part of the process which invariably operates to overcome the will of a suspect." *Id.* at 114 (Brennan, J., dissenting).

[40] *Id.* at 112 (Brennan, J., dissenting).

[41] *Id.* at 108 (White, J., concurring). Besides these rulings, the Court issued two rulings concerning the definition of "custodial interrogation." In Oregon v. Mathiason, 429 U.S. 492 (1977), the Court held that a parolee who was not forced to come to the police station and who was not arrested when he did come was not in custody and, consequently, was not entitled to *Miranda* warnings. More recently, in Rhode Island v. Innis, 446 U.S. 291 (1980), the Court held that a suspect who directed police to a weapon in response to one officer's comments to another was not interrogated and, consequently, was not denied the *Miranda* right to maintain silence. These rulings did not necessarily weaken *Miranda*, since the Warren Court never clearly defined "custodial interrogation." Regardless, analysis of cases concerning this definition would be extensive and would require a separate article, so these cases are not covered here.

In addition to these rulings, the Burger Court refused to extend *Miranda* to new situations. In 1976 and 1977, the Court refused to extend the protections to prison disciplinary hearings,[42] civil tax proceedings,[43] and grand jury investigations.[44] The Warren Court might not have extended *Miranda* to these situations either, but the Burger Court's unwillingness to extend the suspects' rights did nothing to dispel the feeling that the Court was gradually dismantling *Miranda*.[45]

On the other hand, the Burger Court passed up other opportunities to erode *Miranda* further. In the aftermath of *Harris*, some prosecutors questioned defendants about their failure to give police an alibi during interrogation. By pointing to the defendants' silence, prosecutors sought to impeach their credibility. This tactic was a logical outgrowth of *Harris*, but the Burger Court disallowed it. In 1975, in *United States v. Hale*,[46] it ruled that federal prosecutors could not utilize the tactic. The Court said defendants' silence could be interpreted in a variety of ways and consequently had little probative value. And in 1976 in *Doyle v. Ohio*,[47] the Court ruled that state prosecutors could not utilize the tactic either. The Court said defendants' silence was protected by the Fifth Amendment.[48]

In conclusion, the Burger Court's rulings primarily served to weaken *Miranda*, though at the same time they exhibited a reluctance to weaken *Miranda* as much as they might have. As Israel observed, "the fact remains that *Miranda* still is the law of the land. Moreover, while its ramifications arguably have been narrowed, the Court has not cast doubt upon its basic premise that the defendant's right against self-incrimination applies to police custodial interrogation . . . ."[49] In short, the Court has become less strict in requiring adherence to its doctrine, but has altered its doctrine in only one respect—allowing prosecutors to use illegally obtained statements to impeach defendants' credibility.[50]

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[42] Baxter v. Palmigiano, 425 U.S. 308 (1976).

[43] Beckwith v. United States, 425 U.S. 341 (1976).

[44] United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977).

[45] To underscore this, Stone notes that in the four years before 1978 the Court granted certiorari in only one of the 35 cases on its appellate docket in which defendants sought review due to alleged violations of *Miranda*, while the Court granted certiorari in 13 of the 25 cases in which governments sought review. Stone, *supra* note 4, at 100.

[46] 422 U.S. 171 (1975).

[47] 426 U.S. 610 (1976).

[48] *Id.* at 617-19.

[49] Israel, *supra* note 4, at 1374. In this context another ruling deserves mention. In Brewer v. Williams, 430 U.S. 387 (1977), the Court held that statements obtained after a former mental patient had been arrested and given *Miranda* warnings were inadmissible, because the former patient had been interrogated subtly without his counsel being present. The Court rejected a request from 22 state attorneys general that it overrule *Miranda*; instead, it decided the case on the basis of the sixth amendment.

III. State Supreme Courts' Rulings

State supreme courts readily invalidated blatant violations of *Miranda*.[51] However, the Burger Court's post-*Miranda* rulings concerned less blatant violations of *Miranda*. From these rulings four issues continually arose before the state supreme courts: Could prosecutors use illegally obtained statements to impeach defendants' credibility? Could prosecutors use the fact that defendants were silent during interrogation to impeach their credibility? Could prosecutors use statements made when police gave suspects incorrect warnings? Could prosecutors use statements made when police refused to stop interrogation after suspects asked them to, or statements made when police agreed to stop but later resumed interrogation?

All relevant state supreme court cases decided after *Harris* were included in the study.[52] Cases were deemed not relevant if they revolved around the factual determination of whether suspects voluntarily waived their rights. Of course, purported "factual determinations" can camouflage a tendency to evade the *Miranda* guidelines.[53] Even genuine factual determinations which conclude that suspects' rights were violated also can conclude that the violations were "harmless errors" and not reversible.[54] But without the record, it is impossible to assess the courts' decisions, so these cases cannot be included.

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[50] Nevertheless, the Court probably has confused some lower court judges about the continuing validity of its doctrine. Consequently, it seems inappropriate to use "compliance-noncompliance" terminology in evaluating lower court decisions. Such terminology presumes that compliance can be ascertained clearly.

[51] *See, e.g.*, Nacoff v. State, 267 N.E.2d 165 (Ind. 1971); State v. Brecht, 485 P.2d 47 (Mont. 1971); State v. Cullison, 227 N.W.2d 121 (Iowa 1975); State v. Callihan, 320 So. 2d 155 (La. 1975).

[52] State supreme court cases concerning these issues were culled from Shepard's U.S. Citations, beginning with cases decided the day after *Harris* and continuing through cases reported in the 1976-1979 edition of the citations, published in January 1978. The term "state supreme court" refers to the highest court in each state. The highest court in Kentucky, Maryland, and New York is the court of appeals. The highest court, for criminal cases, in Oklahoma and Texas is the court of criminal appeals.

[53] For a discussion of voluntary waiver of rights, see Child, *The Involuntary Confession and the Right to Due Process: Is a Criminal Defendant Better Protected in the Federal Courts than in Ohio?*, 10 Akron L. Rev. 261 (1976). For an early analysis of cases in which "factual determinations" may have camouflaged a tendency to evade the guidelines, see Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. Chi. L. Rev. 413 (1969).

[54] Chapman v. California, 386 U.S. 18 (1967). For analysis, see Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. Pa. L. Rev. 15 (1976).

USING ILLEGALLY OBTAINED STATEMENTS TO IMPEACH CREDIBILITY

In *Miranda*, the Warren Court asserted that prosecutors should not use illegally obtained statements for any purpose.[55] But in *Harris* the Burger Court ruled that prosecutors could use illegally obtained statements to impeach defendants' credibility.[56] Justice Brennan, dissenting, noted that before the ruling fourteen state appellate courts and six federal appellate courts agreed that prosecutors could not use such statements to impeach defendants' credibility, while only three state appellate courts disagreed.[57] Since *Harris*, however, this tendency has been reversed.

Of the twenty-seven state supreme courts which addressed the issue, twenty-one fully embraced *Harris*.[58] Typical of these was the Arkansas court, which quoted Chief Justice Burger's opinion approvingly: " 'The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense. . . .' "[59] Less typical were the Colorado and Florida courts, which overruled their own precedents in order to conform to *Harris*. Both criticized the ruling. One observed that it contradicted the "plain English" of *Miranda*.[60] The other observed that it allowed jurors to use statements to assess credibility which were forbidden to be used in determining guilt. The court questioned whether jurors could be this discriminating and disciplined.[61]

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[55] 384 U.S. at 477.

[56] 401 U.S. at 225-26.

[57] *Id.* at 231 n.4 (Brennan, J., dissenting).

[58] Campbell v. State, 341 So. 2d 742 (Ala. 1976); State v. Jorgenson, 108 Ariz. 476, 502 P.2d 158 (1972); State v. Johnson, 109 Ariz. 70, 505 P.2d 241 (1973); State v. Mincey, 115 Ariz. 472, 566 P.2d 273 (1977); Rooks v. State, 250 Ark. 561, 466 S.W.2d 478 (1971); Jorgenson v. People, 174 Colo. 144, 482 P.2d 962 (1971); People v. Harris, 191 Colo. 234, 552 P.2d 11 (1976); Hill v. State, 316 A.2d 557 (Del. 1974); State v. Retherford, 270 So. 2d 363 (Fla. 1973); Nowlin v. State, 346 So. 2d 1020 (Fla. 1977); McHan v. State, 232 Ga. 470, 207 S.E.2d 457 (1974); People v. Byers, 50 Ill. 2d 210, 278 N.E.2d 65 (1972); People v. Moore, 54 Ill. 2d 33, 294 N.E.2d 297 (1973); Davis v. State, 256 Ind. 58, 271 N.E.2d 893 (1971); Johnson v. State, 258 Ind. 683, 284 N.E.2d 517 (1972); State v. Greene, 214 Kan. 78, 519 P.2d 651 (1974); State v. Andrews, 218 Kan. 156, 542 P.2d 325 (1975); State v. Marin, 352 A.2d 746 (Me. 1976); Commonwealth v. Harris, 364 Mass. 236, 303 N.E.2d 115 (1973); People v. Brown, 399 Mich. 350, 249 N.W.2d 693 (1976); Booker v. State, 326 So. 2d 791 (Miss. 1976); Murphy v. State, 336 So. 2d 213 (Miss. 1976); State v. Bazis, 190 Neb. 586, 210 N.W.2d 919 (1973); Johnson v. State, 92 Nev. 405, 551 P.2d 241 (1976); State v. Bryant, 280 N.C. 551, 187 S.E.2d 111 (1972); State v. Overman, 284 N.C. 335, 200 S.E.2d 604 (1973); State v. Kassow, 28 Ohio St. 2d 141, 277 N.E.2d 435 (1971); Langdell v. State, 556 P.2d 1076 (Okla. Crim. App. 1976); Riddell v. Rhay, 79 Wash. 2d 248, 484 P.2d 907 (1971); State v. Davis, 82 Wash. 2d 790, 514 P.2d 149 (1973); Ameen v. State, 51 Wis. 2d 175, 186 N.W.2d 206 (1971); Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482 (1973).

[59] Rooks v. State, 250 Ark. at 564, 466 S.W.2d at 480 (quoting Harris v. New York, 401 U.S. at 226).

[60] Jorgenson v. People, 174 Colo. at 148, 482 P.2d at 964.

[61] Nowlin v. State, 346 So. 2d 1020. But whether praising or criticizing *Harris*, some of these courts refined the ruling to require the trial court to conduct a voluntariness hearing

Of the six remaining state supreme courts which addressed the issue, four neither fully embraced *Harris* nor completely rejected it. The New Jersey and Maryland courts accepted it in principle but limited it in practice. The New Jersey court had to confront the sort of abuse which critics of the ruling predicted would flow from it. The court overruled a judge who instructed jurors to feel free to use illegally obtained statements in determining guilt, since they could not separate, in their own minds, using illegally obtained statements to assess credibility from using the statements to determine guilt.[62] The court also admonished a prosecutor who tried to use statements to impeach a defendant's credibility despite the fact that the defendant never testified.[63] The Maryland court held more broadly that prosecutors should not use illegally obtained statements even when defendants do testify unless the defendants themselves raise the subject of their prior statements.[64] The Oregon and Pennsylvania courts, unlike the New Jersey and Maryland courts, did not accept the ruling in principle, but they did not reject it in principle either. They distinguished *Harris* from cases before them.[65]

Of all the state supreme courts which addressed the issue, only two completely rejected *Harris*.[66] The Hawaii court was the first,[67] followed by the California court, which initially adopted *Harris*[68] but two years later rejected it.[69] The switch apparently was prompted by a flagrant violation of *Miranda*.[70] Both courts based their decisions upon state con-

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outside the presence of the jury before allowing prosecutors to use illegally obtained statements. The Burger Court did not consider this, as Harris did not claim that his statements were involuntary. Campbell v. State, 341 So. 2d 742; State v. Jorgenson, 108 Ariz. 476, 502 P.2d 158; Hill v. State, 316 A.2d 557; Booker v. State, 326 So. 2d 791; Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482.

[62] State v. Miller, 67 N.J. 229, 337 A.2d 36 (1975).

[63] State v. Davis, 67 N.J. 222, 337 A.2d 33 (1975). But for an earlier decision accepting *Harris* in principle, see State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972).

[64] State v. Kidd, 281 Md. 32, 375 A.2d 1105 (1977); State v. Franklin, 281 Md. 51, 375 A.2d 1116 (1977).

[65] State v. Haas, 267 Or. 489, 517 P.2d 671 (1973). The court said *Harris* did not apply because Harris was not given proper warnings, while Haas was, but was not provided with an attorney. Commonwealth v. Woods, 455 Pa. 1, 312 A.2d 357 (1973), *cert. denied*, 419 U.S. 880 (1974); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975).

[66] The courts were free to reject *Harris*, because the Burger Court has allowed them to impose stricter standards upon police and prosecutors than it has required them to impose. In fact, Justice Brennan encouraged them to impose stricter standards. In *Mosley* he said that "no State is precluded by the decision from adhering to higher standards under state law. Each [s]tate has power to impose higher standards governing police practices under state law than is required by the Federal Constitution." 423 U.S. at 120 (Brennan, J., dissenting).

[67] State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971).

[68] People v. Nudd, 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974).

[69] People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

[70] *Id.* at 116, 545 P.2d at 282, 127 Cal. Rptr. at 370 (Wright, C.J., concurring). In addition to the Hawaii and California courts, the Texas court forbade use of illegally obtained statements to impeach credibility, but it did so on the basis of a state statute rather than on

stitutional provisions similar to the fifth amendment's right against compulsory self-incrimination.

The state supreme court's cases are compiled in Table 1. As can be seen, the courts permitted prosecutors to use illegally obtained statements to impeach defendants' credibility in thirty-five of the forty-three cases they decided.

TABLE 1

USING ILLEGALLY OBTAINED STATEMENTS TO IMPEACH CREDIBILITY

Ruling	Cases	%
Permitted	35	81
Not Permitted	8	19
Total	43	100

USING SILENCE TO IMPEACH CREDIBILITY

In *Miranda* the Warren Court stated that prosecutors should not point to defendants' silence at interrogation.[71] But in *Harris* the Burger Court opened the door, perhaps unwittingly, to use of this tactic. Presumably, the *Harris* ruling applied only when police violated *Miranda* and, as a result, defendants made inculpatory statements. The *Harris* Court held that prosecutors could use these statements to impeach defendants' credibility. But the ruling could have been interpreted more broadly to signal the Court's intention to allow prosecutors greater leeway whenever they sought to impeach defendants' credibility. This interpretation raised the possibility that the Court would decide that prosecutors also could use the fact that defendants were silent at interrogation, in order to impeach their credibility. This tactic might be used if defendants testified and proceeded to give an alibi which they had not given police at arrest or interrogation. Prosecutors could then ask why they were silent when it would have been normal for them to give an alibi if they really had one. This tactic, of course, would penalize defendants for exercising their *Miranda*-guaranteed right to silence. It would discourage them from testifying, or, if they did testify, it would

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the basis of *Miranda* or a state constitutional provision, so its decision is not included in the numerical tally. Whiddon v. State, 492 S.W.2d 566 (Tex. Crim. App., 1973).

[71] "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37.

make them vulnerable. The Warren Court realized the dangers inherent in this tactic and prohibited prosecutors from employing it. Yet after *Harris* some courts seemed to expect the Burger Court to permit it. The Court eventually prohibited this tactic in the federal courts, four years after *Harris*, in *Hale*. One year later, in *Doyle*, the Court prohibited this tactic in the state courts as well.

In the meantime there was considerable confusion in the state supreme courts.[72] Before *Hale* fourteen courts had decided cases involving such prosecutorial conduct. The Kansas and New York courts permitted it.[73] Justifying its decision, the New York court stated that *Harris* "modified" the scope of *Miranda*.[74] The Arizona court, in four cases in 1971 and 1972, also permitted it.[75] The court cited *Harris* and declared, "We are still of the opinion that a defendant who takes the stand waives his Fifth Amendment privilege against self-incrimination . . . ."[76] But the court in 1973 reversed itself.[77] The Alaska and Ohio courts permitted it when the defense first mentioned the defendants' silence, but they indicated they probably would not do so otherwise.[78] The nine remaining state supreme courts prohibited the prosecutorial conduct. The Pennsylvania court asserted sharply that *Harris* did not apply;[79] the rest simply said that such conduct violated *Miranda*.[80]

After *Hale*, but before *Doyle*, five state supreme courts decided cases involving this conduct. Only the Tennessee court allowed prosecutors to use defendants' silence, and then only when the silence was inconsistent with defendants' testimony.[81] The other courts did not allow prosecutors to use defendants' silence.[82] While noting that *Hale* did not apply to the states, these courts stated that the same reasoning would apply. The New Jersey court went further, arguing that *Hale* was not strong enough, because it was based on the weak evidentiary value of defendants' silence rather than on the fifth amendment.[83]

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[72] In *Hale*, Chief Justice Burger called the issue "a tempest in a saucer," but some courts did find it troublesome. 422 U.S. at 181 (Burger, C.J., concurring).

[73] State v. Bly, 215 Kan. 168, 523 P.2d 397 (1974); People v. Rothschild, 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974).

[74] 35 N.Y.2d at 359, 320 N.E.2d at 641, 361 N.Y.S.2d at 904-05.

[75] State v. Altman, 107 Ariz. 93, 482 P.2d 460 (1971); State v. Peterson, 107 Ariz. 268, 485 P.2d 1158 (1971); State v. O'Dell, 108 Ariz. 53, 492 P.2d 1160 (1972); State v. Belcher, 108 Ariz. 290, 496 P.2d 590 (1972).

[76] 107 Ariz. at 270, 485 P.2d at 1160.

[77] State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973).

[78] Davis v. State, 501 P.2d 1026 (Alaska 1972); State v. Young, 27 Ohio St. 2d 310, 272 N.E.2d 353 (1971).

[79] Commonwealth v. Dulaney, 449 Pa. 45, 295 A.2d 328 (1972); Commonwealth v. Woods, 455 Pa. 1, 312 A.2d 357 (1973), *cert. denied*, 419 U.S. 880 (1974).

[80] Hines v. People, 179 Colo. 4, 497 P.2d 1258 (1972); People v. Wright, 182 Colo. 87, 511 P.2d 460 (1973); People v. Robles, 183 Colo. 4, 514 P.2d 630 (1973); People v. Burress, 183 Colo. 146, 515 P.2d 460 (1973); State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971); Cessna v. Commonwealth, 465 S.W.2d 283 (Ky. 1971); People v. Graham, 386 Mich. 452, 192 N.W.2d 255 (1971); People v. Bobo, 390 Mich. 355, 212 N.W.2d 190 (1973); Buchanan v. State, 523 P.2d 1134 (Okla. Crim. App. 1974); Miles v. State, 525 P.2d 1249 (Okla. Crim. App. 1974); Reid v. Commonwealth, 213 Va. 790, 195 S.E.2d 866 (1973); State v. Dean, 67 Wis. 2d 513, 227 N.W.2d 712 (1975), *cert. denied*, 423 U.S. 1074 (1976); Gabrielson v. State, 510 P.2d 534 (Wyo. 1973).

After *Doyle* thirteen state supreme courts decided cases involving this conduct. Though two distinguished *Doyle* rather lamely from their cases,[84] the others followed *Doyle* routinely.[85] Thus, the Burger Court's decisions in *Hale* and, especially, *Doyle* seemed to "settle the question"[86] that the *Harris* decision had raised.[87]

The state supreme courts' cases are tallied in Table 2. For the entire period between *Harris* and *Doyle* the courts permitted prosecutors to use defendants' silence to impeach their credibility in eleven of the forty-four cases they decided, with most of these eleven coming before *Hale*.

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[81] Braden v. State, 534 S.W.2d 657 (Tenn. 1976).

[82] Niemeyer v. Commonwealth, 533 S.W.2d 218 (Ky. 1976); Vipperman v. State, 92 Nev. 213, 547 P.2d 682 (1976); State v. Deatore, 70 N.J. 100, 358 A.2d 163 (1976); Jerskey v. State, 546 P.2d 173 (Wyo. 1976).

[83] State v. Deatore, 70 N.J. at 109, 358 A.2d at 168.

[84] State v. Osborne, 50 Ohio St. 2d 211, 364 N.E.2d 216 (1977); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977). Actually, the North Carolina court did not mention *Doyle*, but it distinguished its case from *Hale*. *Id.* at 558, 231 S.E.2d at 626.

[85] Stork v. State, 559 P.2d 99 (Alaska 1977); State v. Alo, 57 Hawaii 418, 558 P.2d 1012 (1976), *cert. denied*, 431 U.S. 922 (1977); State v. White, 97 Idaho 708, 551 P.2d 1344 (1976); Jones v. State, 265 Ind. 447, 355 N.E.2d 402 (1976); State v. Mims, 220 Kan. 726, 556 P.2d 387 (1976); State v. Heath, 222 Kan. 50, 563 P.2d 418 (1977); State v. Smith, 336 So. 2d 867 (La. 1976); State v. Lyle, 73 N.J. 403, 375 A.2d 629 (1977); State v. Carmody, 253 N.W.2d 415 (N.D. 1977); State v. Boyd, 233 S.E.2d 710 (W. Va. 1977); State v. Thompson, 88 Wash. 2d 518, 564 P.2d 315 (1977); Irvin v. State, 560 P.2d 372 (Wyo. 1977). The Hawaii and Washington courts did permit prosecutors to use defendants' silence to impeach their testimony if the defendants claimed they were not silent. The Burger Court did approve this. In *Doyle* it said, "It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest." 426 U.S. at 619-20 n.11. The Michigan court, in its two cases before *Hale*, also permitted this. People v. Graham, 386 Mich. at 456-57, 192 N.W.2d at 257; People v. Bobo, 390 Mich. at 359, 212 N.W.2d at 192.

[86] State v. Mims, 220 Kan. at 730, 556 P.2d at 391.

[87] Occasionally cases arose in which prosecutors used defendants' silence not merely to impeach their credibility but to infer their guilt. This usually happened when defendants chose not to testify, thereby thwarting prosecutors' efforts to impeach their credibility. The prosecutors elicited testimony about the defendants' silence from police and sometimes added their own comments. State supreme courts nearly always considered this a clear violation of the fifth amendment. *See, e.g.*, Kagebein v. State, 254 Ark. 904, 496 S.W.2d 435 (1973); State v. Ritson, 210 Kan. 760, 504 P.2d 605 (1972); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975). For a contrary decision, see Bennett v. State, 231 Ga. 458, 202 S.E.2d 99 (1973). But the Georgia court reversed itself after *Doyle*. Howard v. State, 237 Ga. 471, 228 S.E.2d 860 (1976).

TABLE 2

USING SILENCE TO IMPEACH CREDIBILITY

Ruling	Cases Before *Hale*	Cases After *Hale*, Before *Doyle*	Cases After *Doyle*	Cases Total	%
Permitted	8	1	2	11	25
Not Permitted	16	5	12	33	75
Total	24	6	14	44	100

GIVING INCORRECT WARNINGS

In *Miranda*, the Warren Court set forth precise warnings for the police to give suspects. Apparently the Court had been dissatisfied with police and lower court compliance with *Escobedo*, and it sought to clarify, as well as elaborate upon, *Escobedo*'s guidelines.[88] It succeeded; its more precise warnings seemed to produce greater compliance.[89] But in *Tucker* the Burger Court showed that it might not require adherence to these precise warnings. It allowed a prosecutor to use statements which police obtained from a suspect after they gave him incorrect warnings. They failed to tell him that if he could not afford an attorney the court would appoint one for him, and the suspect, without benefit of an attorney, made inculpatory statements. The Court said that since the interrogation was before *Miranda* the police could not be expected to have complied with *Miranda*. In addition, the Court said the police nearly complied with *Miranda* anyway. The Court did not stipulate which of these two factors was controlling.[90] If the first was, the ruling would have little application; few cases after *Tucker* would involve interrogations before *Miranda*. But if the second was controlling, the ruling would have considerable application; many cases would involve at least minor errors by police when they gave the warnings. Because the Court did not stipulate, it provided lower courts the opportunity to interpret it as they wished.

In numerous cases state supreme courts were confronted with complaints that police did not give correct warnings. The complaints fell into two categories: (1) police did not inform suspects of all their rights, omitting, usually, the notification that if they were too poor to afford an attorney the court would appoint one for them; and (2) police informed suspects of all their rights but informed them with confusing statements.[91]

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[88] Romans, *supra* note 17, at 51-52.

[89] *Id.* at 58.

[90] Justice Rehnquist did say it was "significant" that the interrogation was before *Miranda*, but this was as close as he came to indicating which factor was controlling. Michigan v. Tucker, 417 U.S. at 447.

When police did not inform suspects of all their rights, state supreme courts usually reversed the convictions. They reversed them in thirteen of the sixteen cases they decided. Before *Tucker* they typically said the warnings were hollow if they did not include the notification that the court would appoint an attorney.[92] Even in three cases in which suspects had been interrogated prior to *Miranda*, as Tucker had been, the courts concluded that the omission was fatal.[93] The only courts which did not reverse the convictions were those presented with unusual facts. In one case the suspect had been given correct warnings three times before the incorrect warning,[94] and in another the suspect could afford an attorney and already had retained one.[95] After *Tucker*, as well, the courts usually reversed the convictions. The Colorado court reversed despite the fact that the suspect had an attorney, though not during interrogation.[96] The Pennsylvania court reversed despite the fact that the suspect had been interrogated prior to *Miranda*.[97] Following an earlier decision in the case, the state appealed, and the Burger Court, in the aftermath of *Tucker*, remanded the decision.[98] But the Pennsylvania high court refused to change it. The court asserted that *Tucker* was irrelevant, because it dealt with the fruits of an admission rather than with the admission itself, as here. Also, to be safe, the court based its decision, in part, on the Pennsylvania Constitution. In contrast, the Florida court did not reverse the conviction appealed to it.[99] The case did not concern an interrogation prior to *Miranda*, so the court easily could have distinguished it from *Tucker*. Yet the court chose not to do so. Ignoring this salient difference between the two cases, the court quoted *Tucker*'s remark that *Miranda* was not meant " 'to create a constitutional strait jacket.' "[100] The court said the warnings were correct enough. Thus, the court showed how a lower court can interpret an ambiguous ruling so as to weaken constitutional rights perhaps more than the upper court had intended.

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[91] A few cases were deemed too trivial to consider. *See* Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971).

[92] Marcus v. State, 291 Ala. 350, 280 So. 2d 793 (1973); People v. Vigil, 175 Colo. 373, 489 P.2d 588 (1971); Perez v. People, 176 Colo. 505, 491 P.2d 969 (1971); Commonwealth v. Bujnowski, 358 Mass. 821, 267 N.E.2d 924 (1971); State v. Williams, 486 S.W.2d 468 (Mo. 1972); Dayton v. State, 484 P.2d 1322 (Okla. Crim. App. 1971); Byers v. Oklahoma City, 497 P.2d 1302 (Okla. Crim. App. 1972); Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973), *vacated*, 417 U.S. 964 (1974), *aff'd on remand*, 464 Pa. 488, 347 A.2d 460 (1975); Burns v. State, 486 S.W.2d 310 (Tex. Crim. App. 1971); Noble v. State, 478 S.W.2d 83 (Tex. Crim. App. 1972); Jackson v. State, 508 S.W.2d 89 (Tex. Crim. App. 1974).

[93] Commonwealth v. Bujnowski, 358 Mass. 821, 267 N.E.2d 924; Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353; Burns v. State, 486 S.W.2d 310.

[94] Sanders v. State, 259 Ind. 43, 284 N.E.2d 751 (1972).

[95] Brown v. State, 470 S.W.2d 543 (Mo. 1971).

[96] People v. Costa, 193 Colo. 386, 566 P.2d 366 (1977).

[97] Commonwealth v. Romberger, 464 Pa. 488, 347 A.2d 460 (1975).

[98] Commonwealth v. Romberger, 417 U.S. 964 (1974).

[99] Alvord v. State, 322 So. 2d 533 (Fla. 1975).

When police informed suspects of all their rights but informed them with confusing statements, state supreme courts were less willing to reverse the convictions. This was true before *Tucker* as well as after. The courts reversed the convictions in just twelve of the thirty-five cases they decided. In some of the cases, the complaints alleged that police did not convey clearly the right to appointed counsel. For example, police gave the following warning: "If you cannot afford to hire a lawyer and want one, we will see that you have a lawyer provided to you before we ask you any questions." Appellants claimed this warning did not indicate that the lawyer would be free, but they could not convince the courts.[101] In other cases the complaints alleged that police did not convey clearly the right to appointed counsel for interrogation, as well as for trial. For example, police gave the following warning: "You have the right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time." While two courts ruled this inadequate,[102] six ruled it sufficiently clear.[103] Police gave similar warnings which appellants claimed did not convey the right to counsel for interrogation, but courts generally were not sympathetic.[104] The Wisconsin court epitomized such decisions when it admitted that the warnings were not "a model of clarity" but noted that they did include all the rights.[105] Some courts found support in *Tucker* for their decisions.[106] The Florida court said *Tucker* recognized the difference between "a violation of the defendants' substantive consitutional rights" and "an inadvertent violation of the procedural safeguards designed to protect those rights."[107] In still other cases the complaints alleged that police did not convey clearly the warning that anything the suspects said could be used against them. These complaints arose when some police warned suspects that anything they said could be used "for or against" them. Obviously nothing they said would be used "for" them, so the warning was misleading. One court found that it violated *Miranda*,[108] but three others thought the error was too minor to constitute a violation.[109] Again, the Wisconsin court said this misleading warning was not major enough to invalidate a confession automatically, but that giving it is "a practice that should not be encouraged, and in some circumstances could result in the vitiation of an otherwise antiseptic confession."[110]

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[100] *Id.* at 537 (citing Michigan v. Tucker, 417 U.S. at 444, quoting Miranda v. Arizona, 384 U.S. at 467).

[101] Commonwealth v. Swint, 450 Pa. 54, 296 A.2d 777 (1972); Commonwealth v. Ponton, 450 Pa. 40, 299 A.2d 634 (1972); Commonwealth v. Jordan, 451 Pa. 275, 301 A.2d 667 (1973).

[102] Moore v. State, 251 Ark. 436, 472 S.W.2d 940 (1971); Reed v. State, 255 Ark. 63, 498 S.W.2d 877 (1973); Schorr v. State, 499 P.2d 450 (Okla. Crim. App. 1972), *overruled in part*, Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975).

[103] Schade v. State, 512 P.2d 907 (Alaska 1973); Dickerson v. State, 257 Ind. 562, 276 N.E.2d 845 (1972); State v. Carpenter, 211 Kan. 234, 505 P.2d 753 (1973); Evans v. State, 275 So. 2d 83 (Miss. 1973); Holifield v. State, 275 So. 2d 851 (Miss. 1973), *cert. dismissed*, 414 U.S. 990 (1973); Burge v. State, 282 So. 2d 223 (Miss. 1973), *cert. denied*, 415 U.S. 985 (1974); People v. Buckler, 39 N.Y.2d 895, 352 N.E.2d 583, 386 N.Y.S.2d 396 (1976); Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975).

[104] Emler v. State, 259 Ind. 241, 286 N.E.2d 408 (1972); Burton v. State, 260 Ind. 94, 292 N.E.2d 790 (1973); Sotelo v. State, 264 Ind. 298, 342 N.E.2d 844 (1976); Provo v. State, 565 P.2d 719 (Okla. Crim. App. 1977); Commonwealth v. Scoggins, 451 Pa. 472, 304 A.2d 102 (1973). But some courts were sympathetic. Watson v. State, 255 Ark. 631, 501 S.W.2d 609 (1973); State v. Fossen, 312 Minn. 414, 255 N.W.2d 357 (1977); Biggerstaff v. State, 491 P.2d 345 (Okla. Crim. App. 1971); Byers v. Oklahoma City, 497 P.2d 1302 (Okla. Crim. App. 1972); Gravett v. State, 509 P.2d 914 (Okla. Crim. App. 1973); Anderson v. State, 510 P.2d 998 (Okla. Crim. App. 1973).

The courts' rulings in these cases are displayed in Table 3. As shown, the courts excused the police's errors in twenty-six of the fifty-one cases. Also, as shown, the courts did not rule much differently after *Tucker* than they did before it.

REFUSING TO STOP INTERROGATION, RESUMING INTERROGATION

In *Miranda*, the Warren Court made clear that suspects undergoing interrogation can exercise their rights to silence or an attorney and request police to stop the interrogation at any time.[111] The Court emphasized that suspects' requests must be "scrupulously honored."[112] But in *Mosley* the Burger Court permitted a prosecutor to use statements obtained after police acceded to a suspect's request to stop but then resumed the interrogation two hours later. In *Miranda*, the Warren Court did not consider this kind of situation. Therefore, *Mosley* can be viewed as refining *Miranda* or, if that precedent is read more literally, weakening it. The Burger Court insisted that *Mosley* be viewed as the former.[113] Yet there is a fine line between refusing to stop and agreeing to stop but resuming again.

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[105] Jones v. State, 69 Wis. 2d 337, 342, 230 N.W.2d 677, 681 (1975).

[106] *See, e.g.*, State v. Statewright, 300 So. 2d 674, 677-78 (Fla. 1974); State v. Davis, 336 So. 2d 805, 808 (La. 1976).

[107] State v. Statewright, 300 So. 2d at 677.

[108] Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971), *cert. denied*, 405 U.S. 1046 (1972); Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971).

[109] State v. Melvin, 65 N.J. 1, 319 A.2d 450 (1974); State v. Vidal, 82 Wash. 2d 74, 508 P.2d 158 (1974); Madkins v. State, 50 Wis. 2d 347, 184 N.W.2d 144 (1971); McClellan v. State, 53 Wis. 2d 724, 193 N.W.2d 711 (1972).

[110] *Id.* at 730, 193 N.W.2d at 715. Occasionally cases arose in which appellants claimed that police violated *Miranda* by failing to warn them that if they waived their rights and began answering questions, they could assert their rights anytime later and stop answering questions. The Warren Court said, "[o]nce warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74. State supreme courts agreed that these are "guidelines for police conduct, not additional elements of the required warning." Miller v. State, 263 Ind. 595, 597, 335 N.E.2d 206, 208 (1975).

[111] "If, however, he indicates in any manner and at any stage that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45.

TABLE 3

GIVING INCORRECT WARNINGS

	Not Inform All Rights[a]		Informed Confusingly[b]		Categories Combined[c]			
Ruling	Cases Before *Tucker*	Cases After *Tucker*	Cases Before *Tucker*	Cases After *Tucker*	Cases Before *Tucker*	Cases After *Tucker*	Cases Total	%
Permitted	2	1	16	7	18	8	26	51
Not Permitted	11	2	10	2	21	4	25	49
Total	13	3	26	9	39	12	51	100

[a] When police did not inform suspects of all their rights.

[b] When police informed suspects of all their rights but informed them with confusing statements.

[c] The two categories combined.

In related cases state supreme courts decided whether police must honor suspects' requests to stop. These cases fell into four categories: (1) suspects requested silence, but police refused to stop; (2) suspects requested an attorney, but police refused to stop for them to get one; (3) suspects requested silence, and police agreed to stop but resumed again; and (4) suspects requested an attorney, and police agreed to stop but resumed again before the suspects got one.

When suspects requested silence but police refused to stop, state supreme courts held the resulting statements inadmissible in ten of the twelve cases they heard. They held the statements inadmissible whether police ignored repeated requests to halt[114] or, after the initial request, subtly prolonged the conversation in hope that suspects would continue talking and answering questions.[115] Even after *Mosley* the courts did not relax their standards. The Arizona and Texas courts declared that *Mosley* "reaffirmed the holding in *Miranda*" that requests to halt must be scrupulously honored.[116] The Arizona court noted that although officers ceased interrogation "their subsequent conduct and statements were made to persuade the defendant to reconsider his position. Any response under such circumstances cannot be considered 'volunteered.' "[117] Only the Louisiana court decided to the contrary. In a pair of cases, it, in effect, brushed *Miranda* aside and used the voluntariness test.[118]

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[112] *Id.* at 479.

[113] Michigan v. Mosley, 423 U.S. at 101-07.

[114] D.P. v. State, 556 P.2d 1256 (Alaska 1976); Holmes v. State, 300 A.2d 6 (Del. 1972); People v. Henenberg, 55 Ill. 2d 5, 302 N.E.2d 27 (1973); State v. Crow, 486 S.W.2d 248 (Mo. 1972).

When suspects requested an attorney but police refused to stop for them to get one, state supreme courts did not rule quite as consistently. They held the statements inadmissible in eighteen of the twenty-seven cases they heard. While they held them inadmissible in nearly all cases in which police ignored repeated requests to halt,[119] or even a single clear request,[120] they did not always hold them inadmissible when the requests were not repeated or clear. According to *Miranda*, the clarity or number of requests should not have mattered, for the ruling mandates police to cease immediately if suspects indicate "in any manner" that they want the police to cease.[121] For a few courts these factors did not matter.[122] The California court said the requests did not need to be unmistakably clear.[123] But for other courts they did matter. Although suspects indicated in at least some manner that they wanted police to cease until they got an attorney, the police either sought to discourage them,[124] or they simply continued to question them,[125] and the courts excused the officers' conduct.

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[115] People v. Superior Court of Marin County, 13 Cal. 3d 406, 530 P.2d 585, 118 Cal. Rptr. 617 (1975); State v. Smith, 295 Minn. 65, 203 N.W.2d 348 (1972); State v. Gallagher, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974).

[116] State v. Sauve, 112 Ariz. 376, 579, 544 P.2d 1091, 1094 (1976); State v. Lee, 114 Ariz. 101, 106, 559 P.2d 657, 662 (1976). *See also* Hearne v. State, 534 S.W.2d 703, 706-07 (Tex. Crim. App. 1976).

[117] State v. Sauve, 112 Ariz. at 579, 544 P.2d at 1094.

[118] State v. Higginbotham, 261 La. 983, 261 So. 2d 638 (1972); State v. Bradford, 263 La. 966, 269 So. 2d 831 (1972).

[119] State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1974); People v. Enriquez, 19 Cal. 3d 221, 561 P.2d 261, 137 Cal. Rptr. 171 (1977); Brown v. State, 256 Ind. 558, 270 N.E.2d 751 (1971); State v. Hilpipre, 242 N.W.2d 306 (Iowa 1976); Dryden v. State, 535 P.2d 483 (Wyo. 1975). The sole exception was State v. Edgell, 30 Ohio St. 2d 103, 283 N.E.2d 145 (1972).

[120] Webb v. State, 258 Ark. 95, 522 S.W.2d 406 (1975); People v. Salazar, 189 Colo. 429, 541 P.2d 676 (1975); People v. Turner, 56 Ill. 2d 201, 306 N.E.2d 27 (1973); Interest of Thompson, 241 N.W.2d 2 (Iowa 1976); Commonwealth v. Murray, 359 Mass. 541, 269 N.E.2d 641 (1971); State v. Hicks, 290 N.C. 767, 228 S.E.2d 252 (1976); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Jones, 37 Ohio St. 2d 21, 306 N.E.2d 409 (1974); Commonwealth v. Bullard, 465 Pa. 341, 350 A.2d 797 (1976); State v. Chapman, 84 Wash. 2d 373, 526 P.2d 64 (1974). The exceptions were Thompson v. State, 328 So. 2d 1 (Fla. 1976); Niehaus v. State, 265 Ind. 655, 359 N.E.2d 513, *cert. denied*, 434 U.S. 902 (1977).

[121] 384 U.S. at 445.

[122] People v. Superior Court of Mono County, 15 Cal. 3d 729, 542 P.2d 1390, 125 Cal. Rptr. 798 (1975); People v. Harris, 191 Colo. 234, 552 P.2d 10 (1976); Micale v. State, 76 Wis. 2d 370, 251 N.W.2d 458 (1977).

When suspects requested silence and police agreed to stop but resumed again, the courts did not side with the appellants as often as they did when police refused to stop. In fact, they rarely sided with the appellants. They held the statements inadmissible in just two of the eleven cases they heard. In both cases the police resumed shortly after stopping.[126] However, in other cases the police resumed fifteen minutes after stopping[127] or twenty to thirty minutes after stopping,[128] and the courts did not hold the statements inadmissible. The decisions seemed to mock the suspects' requests that interrogation cease, but the courts said that they considered factors besides the length of time between stopping and resuming. These factors included a change in locations, in the officers conducting the interrogation, or in the charges to be filed against the suspect.[129] It is not apparent why a change in locations or in the officers conducting the interrogation would justify renewed questioning, but consideration of these factors meant that the balance almost always weighed against the appellants.[130] In response to an appellant's claim that any resumption narrowed *Miranda*, the Colorado court justified its decision by stating that "a periodic repeating of the procedure until the accused finally makes a statement would not be permitted."[131]

When suspects requested an attorney and police agreed to stop but resumed again before the suspects got one, the courts issued rulings which did not show any pattern. They held the statements inadmissible in six of the thirteen cases they decided. Thus, they did side with the appellants more often than they did when the appellants requested silence and police resumed. Perhaps this was due to the unequivocal sentence in *Miranda*: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[132] Or perhaps this was due to Justice Stewart's comment in *Mosley* that the case would have been different if Mosley had asked for an attorney.[133] For whatever reason, state supreme courts held statements inadmissible not only when police apparently used deception,[134] but also when police subtly thwarted efforts to call an attorney,[135] subtly resumed interrogation,[136] and even innocently questioned a suspect who already had asked another officer for an attorney.[137] Yet other courts did not hold statements obtained in very similar circumstances inadmissible.[138] One court did not hold statements inadmissible even when they were obtained after repeated demands for an attorney.[139] These courts seemed to disregard *Miranda* and substitute the voluntariness test.[140]

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[123] People v. Superior Court of Mono County, 15 Cal. 3d at 736, 542 P.2d at 1395, 125 Cal. Rptr. at 802-03 (quoting People v. Randall, 1 Cal. 3d 948, 955, 464 P.2d 114, 118, 83 Cal. Rptr. 658, 662 (1970)).

[124] Riddle v. State, 264 Ind. 587, 348 N.E.2d 635 (1976); Meyer v. Commonwealth, 482 S.W.2d 479 (Ky. 1971), *cert. denied*, 406 U.S. 919 (1972); Shadoan v. Commonwealth, 484 S.W.2d 842 (Ky. 1972); State v. Keesecker, 198 Neb. 426, 253 N.W.2d 169 (1977).

[125] People v. White, 61 Ill. 2d 288, 335 N.E.2d 457 (1975), *cert. denied*, 424 U.S. 970 (1976); LaBonte v. Commonwealth, 217 Va. 677, 232 S.E.2d 738 (1977); Clodfelter v. Commonwealth, 218 Va. 98, 235 S.E.2d 340 (1977).

[126] State v. Thompson, 256 N.W.2d 706 (N.D. 1977); Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973).

[127] State v. Robinson, 87 S.D. 375, 209 N.W.2d 374 (1973).

[128] State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975).

[129] *See id.* at 434, 219 S.E.2d at 212.

[130] Dyett v. People, 177 Colo. 370, 494 P.2d 94 (1972); Rogers v. State, 262 Ind. 315, 315 N.E.2d 707 (1974); State v. O'Neill, 299 Minn. 60, 216 N.W.2d 822 (1974); People v. Gary, 31 N.Y.2d 68, 286 N.E.2d 263, 334 N.Y.S.2d 883 (1972); Dennis v. State, 561 P.2d 88 (Okla. Crim. App. 1977); Commonwealth v. Grandison, 449 Pa. 231, 296 A.2d 730 (1972); State v. Estrada, 63 Wis. 2d 476, 217 N.W.2d 359, *cert. denied*, 419 U.S. 1093 (1974).

[131] Dyett v. People, 177 Colo. at 373, 494 P.2d at 95.

The cases are broken down in Table 4. As shown, the courts allowed the police conduct in twenty-eight of the sixty-three cases. Also, as shown, the number of cases in which they allowed the conduct did not increase after *Mosley*.

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[132] 384 U.S. at 474. *See* State v. Lachapelle, 112 R.I. 105, 308 A.2d 467 (1973).

[133] 423 U.S. at 101, n.7. *See* State v. Moscone, 171 Conn. 500, 370 A.2d 1030 (1976).

[134] State v. Travis, 116 R.I. 678, 360 A.2d 548 (1976).

[135] People v. Jackson, 41 N.Y.2d 146, 359 N.E.2d 677, 391 N.Y.S.2d 82 (1976).

[136] People v. Richards, 194 Colo. 83, 568 P.2d 1173 (1977).

[137] Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971).

[138] Apparently used deception and subtly thwarted efforts to call—State v. Krueger, 194 Neb. 304, 231 N.W.2d 364 (1975); subtly resumed interrogation—State v. Miley, 291 N.C. 431, 230 S.E.2d 537 (1976); innocently questioned suspect who already had asked another officer for an attorney—Looms v. State, 261 Ark. 803, 551 S.W.2d 546 (1977). Cases which did not involve similar circumstances were Commonwealth v. Jefferson, 445 Pa. 1, 281 A.2d 852 (1971); Sweiberg v. State, 511 S.W.2d 50 (Tex. Crim. App. 1974).

[139] Ladd v. State, 568 P.2d 960 (Alaska 1977), *cert. denied*, 435 U.S. 928 (1978).

[140] *See* French v. State, 266 Ind. 276, 362 N.E.2d 834 (1977). Occasionally cases arose in which police themselves decided to stop interrogation but later resumed again without giving the *Miranda* warnings anew. *See, e.g.*, State v. Gholson, 112 Ariz. 545, 544 P.2d 654 (1976). State supreme courts considered a variety of factors when they judged the police conduct. For discussion, see Commonwealth v. Wideman, 460 Pa. 699, 706-07, 334 A.2d 594, 598 (1975). Generally, the courts permitted the conduct on the grounds that the police were engaged in a single, continuous interrogation. *See* Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971).

TABLE 4

REFUSING TO STOP INTERROGATION, RESUMING INTERROGATION

	Refused Stop When Requested Silence[a]		Refused Stop When Requested Attorney[b]		Resumed After Requested Silence[c]		Resumed After Requested Attorney[d]		Categories Combined[e]			
Ruling	Cases Before *Mosley*	Cases After *Mosley*	Cases Before *Mosley*	Cases After *Mosley*	Cases Before *Mosley*	Cases After *Mosley*	Cases Before *Mosley*	Cases After *Mosley*	Cases Before *Mosley*	Cases After *Mosley*	Cases Total	%
Permitted	2	4	4	5	8	1	3	4	17	10	27	43
Not Permitted	6	4	10	8	1	1	2	4	19	17	36	57
Total	8	4	14	13	9	2	5	8	36	27	63	100

[a] When suspects requested silence, but police refused to stop.
[b] When suspects requested an attorney, but police refused to stop.
[c] When suspects requested silence, and police agreed to stop but resumed again.
[d] When suspects requested an attorney, and police agreed to stop but resumed again.
[e] The four categories combined.

IV. CONCLUSION

It was hypothesized that the state supreme courts eroded the *Miranda* principles first enunciated by the Warren Court. Unquestionably, this hypothesis was upheld. Most courts permitted prosecutors to use illegally obtained statements to impeach defendants' credibility, to use statements made when police gave confusing warnings, and to use statements made when police resumed interrogation after suspects had cut off interrogation by demanding silence.

It was also hypothesized that the state supreme courts eroded the *Miranda* principles more than the Burger Court had. Generally, this hypothesis was not supported. Though some courts read *Harris* as a cue to relax enforcement of the *Miranda* principles and to allow prosecutors to use defendants' silence to impeach their credibility, most did not. Also most courts did not allow prosecutors to use statements made when police gave incomplete warnings or to use statements made when police refused to cease interrogation after suspects had asked them to cease.

Of course, not all state supreme courts exhibited similar decision-making. Differences between them were described throughout the article and can be seen in Table 5. With the large number of cases potentially relevant to this research, it was hoped that each state court could be classified according to the degree to which it eroded the *Miranda* principles. Unfortunately, the number of cases was not large enough. Some courts did not decide any cases which were relevant, and other decided only a handful. Consequently, most courts could not be classified. Nevertheless, it is worth noting that some courts, such as the Florida, Indiana, and Mississippi courts, were prone to erode the principles, while others, such as the Colorado and Wyoming courts, were not.

TABLE 5

ACCEPTANCE OF ALL POLICE AND PROSECUTORIAL PRACTICES, BY STATE[a]

State	Permitted[b]	Not Permitted[c]	State	Permitted[b]	Not Permitted[c]
Alabama	1	1	Montana	0	0
Alaska	3	2	Nebraska	3	0
Arizona	7	4	Nevada	1	1
Arkansas	2	4	New Hampshire	0	0
California	1	4	New Jersey	2	5
Colorado	3	10	New Mexico	0	0
Connecticut	0	1	New York	3	1
Delaware	1	1	North Carolina	5	2
Florida	5	0	North Dakota	0	2
Georgia	1	0	Ohio	4	2
Hawaii	0	2	Oklahoma	4	9
Idaho	0	2	Oregon	0	1
Illinois	3	2	Pennsylvania	6	11
Indiana	11	2	Rhode Island	0	2
Iowa	0	2	South Carolina	0	0
Kansas	4	2	South Dakota	1	0
Kentucky	1	2	Tennessee	1	0
Louisiana	3	1	Texas	1	4
Maine	1	0	Utah	0	0
Maryland	1	1	Vermont	0	0
Massachusetts	1	2	Virginia	2	1
Michigan	1	2	Washington	3	2
Minnesota	1	2	West Virginia	0	1
Mississippi	5	0	Wisconsin	6	2
Missouri	1	2	Wyoming	0	5
			Total	99	102

[a] All of the practices covered in this article.

[b] Number of cases in which the courts permitted the police and prosecutorial practices at issue.

[c] Number of cases in which the courts did not permit the practices at issue.

However, there were enough cases to show regional differences. Overall, the courts decided to allow the police and prosecutorial practices at issue in about fifty percent of their cases, but, as Table 6 shows, this figure is misleading. It masks sharp regional differences.[141] The southern and midwestern courts were most prone to erode *Miranda*, while the western and eastern courts were least prone to do so. Presumably, the greater political conservatism of the South and Midwest extended to judicial acceptance of the *Miranda* principles.[142]

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[141] Even if the courts with a disproportionate number of cases, such as the Indiana court, are excluded, the figures show substantial regional differences.

TABLE 6

ACCEPTANCE OF ALL POLICE AND PROSECUTORIAL PRACTICES, BY REGION[a]

Region	Permitted[b]	Not Permitted[c]	% Permitted
East[d]	15	25	37.5
Midwest[e]	39	29	57.35
South[f]	27	15	64.29
West[g]	18	33	35.29
Total	99	102	49.25

[a] All of the practices covered in this article.

[b] Number of cases in which the courts permitted the police and prosecutorial practices at issue.

[c] Number of cases in which the courts did not permit the practices at issue.

[d] Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, West Virginia.

[e] Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Wisconsin.

[f] Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia.

[g] Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming.

Of the three models used to characterize the relationship between the Supreme Court and the lower courts, the bureaucratic model, where the Supreme Court establishes policy and the lower courts impose bureaucratic restraints, is the most useful in explaining the relationship as it affects the *Miranda* policy. The Supreme Court under Chief Justice Warren established the policy, and the Court under Chief Justice Burger maintained the policy, with one significant exception.[143] Moreover, the Court persuaded the state supreme courts to implement the policy. Previous research found that the state supreme courts generally enforced the *Miranda* requirements as early as 1968,[144] and this research found that the state supreme courts generally enforced the requirements throughout the 1970s.[145] Nevertheless, the courts did not implement the policy automatically. They eroded it in certain types of cases. Naturally, they eroded it in cases in which prosecutors used illegally obtained statements to impeach defendants' credibility, but they eroded it here in response to the Burger Court's single change in the *Miranda* policy. However, they eroded it in other cases as well.

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[142] Dolbeare and Hammond found remarkably similar regional differences in their study of school district compliance with the Court's school prayer decisions. The southern and midwestern school districts complied least, while the eastern and western districts complied most. K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 29-32 (1971). Consequently, Charles Johnson suggested that region might be the system-level variable most consistently related to lower court reaction to Supreme Court decisions. Johnson, *The Implementation and Impact of Judicial Policies: A Heuristic Model*, in PUBLIC LAW AND PUBLIC POLICY 107, 118 (J. Gardiner ed. 1977). Kagan, Cartwright, Friedman, and Wheeler suggested that the extent of case-selecting discretion might be a variable related to state supreme court reaction to Supreme Court criminal decisions. Kagan, Cartwright, Friedman, & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 994-97 (1978); Kagan, Cartwright, Friedman, & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977). Though this variable is intriguing as an explanation for differences in state supreme court decision-making, it does not explain the differences in this research. This could be due to the small number of cases individual courts decided, or it could be due to other, unknown factors.

In addition, the bureaucratic model is the most useful in explaining the relationship between the Supreme Court and state supreme courts because the model suggests that Court policy which is clear is more likely to be implemented than policy which is not clear. While *Miranda* was clear, the Burger Court's rulings which weakened *Miranda*, with one exception, were not particularly clear. Consequently, they did not result in as much erosion of the *Miranda* principles by state supreme courts as observers seemed to expect. Instead, these courts often refused to alter their liberal policies regarding confessions, even though the Burger Court's rulings were unquestionably conservative in direction. Correspondingly, the Burger Court's ruling that was the one exception and was clear—*Harris*—did result in considerable erosion. Thus, the role of clarity, as seen in the relationship between *Escobedo* and *Miranda*, also can be seen in the relationship between *Miranda* and the Burger Court's rulings.

The role of clarity can be illustrated more specifically by noting a pair of distinctions drawn by many of the courts. The courts did not excuse police when they gave incomplete warnings but did excuse police when they gave confusing warnings; and the courts did not excuse police when they refused to cease interrogation after suspects had asked them to cease but did excuse police when they resumed interrogation after they agreed to cease. The first practice of each of these distinctions is explicitly prohibited by *Miranda*, while the second of each is prohibited only implicitly. Because the second of each is prohibited only implicitly, the courts could claim that the policy regarding these practices is ambiguous. Their claim might reflect genuine confusion, or it might reflect a desire to exploit the situation for their own preferred ends. Either way, the policy regarding these practices was not implemented due to the bureaucratic inefficiency or recalcitrance provoked by the ambiguity.

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[143] The exception is permitting prosecutors to use illegally obtained statements to impeach defendants' credibility.

[144] Romans, *supra* note 17, at 52-53.

[145] It is worth noting that the courts' opinions seem to reflect the expectation that *Miranda* will continue to remain in effect. The opinions do not predict the ruling's demise, unlike the commentators' remarks. Further, the opinions do not criticize the ruling often. In fact, they criticize the ruling less often than they do the Burger Court's decisions which chipped away at it.

The role of clarity, as seen in the relationship between *Miranda* and the Burger Court's rulings, would also suggest the validity of the "Neustadt theory" to explain lower court reaction to Supreme Court rulings. This theory is derived from Neustadt's analysis of presidential power to obtain compliance with directives.[146] Applied to judicial power, this theory maintains that rulings which are clearly written, persuasively argued, and apparently final are more likely to produce compliance than those which are not.[147] *Miranda* was clearly written and, at the same time, probably perceived as persuasively argued and apparently final.[148]

In conclusion, the state supreme courts eroded the *Miranda* principles, but they did not erode them as much as they might have been expected to do. They did not erode them more than the Burger Court itself did. Nevertheless, if the Court does continue to weaken *Miranda*, prosecutors undoubtedly would ask the state supreme courts to follow The courts would not have to do so, however, since they could effectively insulate liberal decisions from Supreme Court review by basing these decisions upon their state constitution or statutes. In fact, some commentators have urged the courts not to follow the Supreme Court.[149] Still, if the Court does continue to weaken *Miranda*, many of the state supreme courts probably will follow,[150] especially if their response to *Harris* is taken to be indicative. It would be ironic if, after the battle to implement the *Miranda* principles had been largely won, the Burger Court sacrificed the victory.

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[146] *See* R. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP WITH REFLECTIONS ON JOHNSON AND NIXON (1976 ed.).

[147] For a fuller explanation of this theory, see G. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS 85-103 (1977).

[148] A ruling that is clear is more likely to be perceived as persuasive and final, rather than as a reflection of some inchoate doctrine. But in other respects, as well, *Miranda*, in comparison with *Escobedo* and other previous rulings, probably was perceived as persuasive and final. Romans, *supra* note 17, at 51-52. With the issuance of the Burger Court's rulings, of course, *Miranda*, in comparison with them, might not have been perceived as so final. But these rulings came five and more years after *Miranda*, and, as such, after *Miranda* produced compliance with the warning requirements. Had the rulings come right on the heels of *Miranda*, presumably they would have undermined the perception of finality of the ruling, and presumably they would have resulted in more erosion by the state supreme courts.

An alternative to the Neustadt theory is the "state impact theory." This theory maintains that rulings which require disruption of long-standing state policies in order to produce compliance are less likely to produce compliance than rulings which do not require such disruption. For a fuller discussion of this theory, see G. TARR, *supra* note 147, at 105-20. This theory is not as applicable to the present research as the Neustadt theory. While it could be argued that state supreme courts were reluctant to reverse their long-standing (five and more years) policy of complying with *Miranda* in favor of eroding *Miranda* in response to the Burger Court's rulngs, "their" policy was a federally imposed policy initially and, because of the opportunity for appellate and habeas corpus review, a federally monitored policy continually. Further, state supreme courts were not reluctant to reverse "their" policy in response to the Burger Court's one clear ruling in *Harris*. Thus, the crucial factor seems to be clarity rather than disruption of long-standing state policies.

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[149] Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

[150] Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). But although Neuborne is not optimistic that state supreme courts would issue liberal decisions in this kind of situation, others have noted such decisions already. Brennan, *supra* note 149, at 498-502. *See also* Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, 8 PUBLIUS 55 (1978), and other articles cited therein.

By Harvey S. Perlman*
and Josephine R. Potuto**

The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview[1]

I. INTRODUCTION

In 1978, after three years of deliberation, the National Conference of Commissioners on Uniform State Laws approved the Uniform Law Commissioners' Model Sentencing and Corrections Act.[2] The Model Act provisions govern the organization of those agencies of state government charged with correctional activities, the process of sentencing criminal offenders, and the treatment of sen-

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[1] UNIFORM LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE (1979) [hereinafter cited as MSCA]. The authors were reporters for the Model Act and Professor Potuto also served as project director. Richard Singer, Professor of Law, Rutgers University-Newark, participated as a reporter from 1975 to 1977. This article is based on the prefatory notes and comments to the Model Act and on a report written by the authors and submitted to the Law Enforcement Assistance Administration upon completion of the Model Sentencing and Corrections Act drafting project. *See* H. Perlman & J. Potuto, Staff Report to the Law Enforcement Assistance Administration on Uniform Law Commissioners' Model Sentencing and Corrections Act (Sept. 1, 1978). Since the authors were responsible for the language in the prefatory notes and comments to the Act, they have made no attempt to indicate where, in this article, portions of those texts have been used verbatim.

[2] The Model Act was developed pursuant to Grant Number 76 NI-99-0022 from the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice. In 1974 the National Conference of Commissioners on Uniform State Laws adopted and published its proposed Uniform Rules of Criminal Procedure. The Uniform Rules established the procedure governing the criminal justice system from prior arrest to sentencing. In a few instances, rules regulating the process of sentencing were also included, but the basis for sentencing criminal offenders and the nature of correctional programs were not addressed. In 1973 a committee of the National Conference was formed to examine the possibility of carrying the work, begun with the Uniform Rules, forward through the sentencing and correctional phases. In 1974, LEAA provided the necessary funds for the project to proceed.

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tenced offenders and persons confined prior to trial. In addition, provisions governing the collateral consequences of conviction and programs for the assistance of victims are proposed. The processes of the juvenile courts, including the system of corrections applied to juvenile offenders, are excluded from the coverage of the Model Act.

The drafting project began at a propitious time. A year earlier the National Advisory Commission on Criminal Justice Standards and Goals (National Advisory Commission) had published its report on Corrections[3] offering a wide-ranging set of recommendations for reform, one of which was the call for wholesale reform of the correctional laws of the fifty states. The Special Committee to Draft the Model Act (Special Committee)[4] relied heavily on this pioneering work.

The fundamental bases for sentencing criminal offenders were also undergoing a major re-examination. The traditional approach to sentencing, adopted by the National Advisory Commission and earlier by the American Bar Association in its Criminal Justice Standards,[5] consisted of a system of judicial sentencing designed to tailor the sentence in each particular case to the needs of the offender and of society. Although there were recommendations to reduce or to structure the discretion of the sentencing court, the system proposed in these reports remained primarily discretionary. Parole was also a critical element of the envisioned system, although here again, recommendations were offered to structure the discretion of paroling authorities.

As the Special Committee began its work, a series of proposals from a variety of different study groups suggested abandoning the traditional practices.[6] The universal feature of these proposals was the recognition that individualized sentencing had failed and should be replaced by a system that provided less disparity of sentences among sentenced defendants. The indeterminate sentence with parole was to be replaced by a flat, determinate sentence.[7] The discretion to select a particular sentence was to be severely restricted, either by legislative mandate or by other devices. Sentences were no longer to reflect the rehabilitative potential of the defendant or an official prediction of the dangerousness of the defendant but were to insure a punishment justly deserved for the offense committed.

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[3] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS (1973) [hereinafter cited as NAC].

[4] This was the committee of Uniform Law Commissioners with primary responsibility for drafting the Act. For more detailed information as to the composition and work of the Special Committee see text accompanying notes 136-39 *infra*.

[5] ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Final Draft, 1968) [hereinafter cited as ABA SENTENCING STANDARDS].

[6] *See, e.g.*, D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1974); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); A. VON HIRSCH, DOING JUSTICE (1976); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976) [hereinafter cited as TWENTIETH CENTURY FUND].

In the late 1960's the courts abandoned what had become known as the "hands off" doctrine under which courts refused to intervene to review the decisions of correctional administrators or the conditions of correctional programs.[8] Instead, courts began to measure correctional practices against constitutional principles and in many instances the existing practices fell short.[9] Since these early beginnings, nearly every aspect of correctional programs has been evaluated by courts. Although in some cases, dramatic change was ordered, it became clear that significant progress would not come easily through judicial decrees. Often, lack of funds prevented prisons from meeting minimum standards even where those in charge of the institution desired to make a change. In a few cases federal courts actually took over the operation of a prison in order to correct unconstitutional conditions and practices.[10] The National Advisory Commission recognized that a comprehensive legislative codification of the rights of persons subject to correctional authority was needed to avoid "the slow, painful, and expensive process of . . . case-by-case litigation."[11]

The National Advisory Commission also examined and evaluated existing legislative proposals relating to sentencing and corrections.[12] Most of the available proposed codifications were developed before the courts had begun to impose constitutional standards on correctional programs. Other proposed legislation addressed relatively specific problems and did not provide a comprehensive or coordinated statutory framework for correctional reform. Although many of these earlier proposals, including the Model Penal Code[13] and the Study Draft of a New Federal Criminal Code,[14] provided a starting point for committee deliberation, the Model Sentencing and Corrections Act goes far beyond earlier attempts to define statutorily the treatment of offenders. Also, the sentencing provisions of the Model Act are based on different premises than these earlier proposals.

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[7] For a general discussion of these terms, see Singer, *In Favor of "Presumptive Sentences" Set by a Sentencing Commission*, 24 CRIME AND DELINQUENCY 401 (1978).

[8] For a discussion of the hands-off doctrine, see, *e.g.*, Cruz v. Beto, 405 U.S. 319, 321-22 (1972) (per curiam); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 503-04 (1971). *See also* Champagne & Haas, *The Impact of* Johnson v. Avery *on Prison Administration*, 43 TENN. L. REV. 275 (1976).

[9] *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977); Wolff v. McDonnell, 418 U.S. 539 (1974); Cruz v. Beto, 405 U.S. 319 (1972); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

[10] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

[11] NAC, *supra* note 3, at 558.

[12] *Id.* at 549-52.

The purpose of this article is to describe the development of the Model Act and to provide an overview of its provisions. This article also discusses the major policy decisions which serve as the foundation for the provisions of the Act. These policy decisions were based on the perception of the "state of the art" of corrections initially held by the authors and subsequently accepted or modified, in whole or in part, by the Special Committee to Draft the Model Act.[15] Several of the major themes of the Act are discussed with some examples of how these themes were incorporated into the statutory provisions. The article also describes the process by which the Act was drafted and the nature of the outside advice and consultation that was available to the Special Committee.

II. GENERAL APPROACHES

If one observation emerges from the events of recent years and the recommendations of those groups that have studied sentencing and corrections, it is that these systems are in need of immediate, pervasive and, in some instances, drastic reform.[16] The prevalent sentencing and corrections systems have few defenders, and it is widely recognized that society is incurring substantial human and material costs by delaying change. The unanimity on the need for change is not, however, matched by universal agreement on the direction which change should take.

The sentencing process utilized by most states is characterized by largely unfettered judicial discretion. In each of these states the legislature has established a broad range of permissible penalties for each offense and the sentencing court is authorized to select some sentence within the range, the selection to be based on a mixture of traditional policies regarding rehabilitation, deterrence, punishment and incapacitation. Limited appellate review of the sentencing judge's decision is available,[17] and the court's sentencing decision is, in many cases, subservient to subsequent parole board decisions. The result is a system that produces substantial disparities in sentencing, both within the sentences imposed by a single judge and between judges in a given jurisdiction.

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[13] MODEL PENAL CODE (Proposed Official Draft 1962).

[14] NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 6.

[15] This article reflects the views of the authors with respect to the drafting process and the underlying policies governing the final provisions of the Model Act. This article has not been formally approved by the Commissioners on Uniform State Laws nor does it necessarily reflect the views of the Commissioners, the Special Committee to Draft the Act, the Review Committee to the Act, or any of those individuals or groups acting as advisors in the drafting of the Act.

[16] *See, e.g.*, ABA JOINT COMM. ON THE LEGAL STATUS OF PRISONERS, STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS, *reprinted in* 14 AM. CRIM. L. REV. 375 (1977) [hereinafter cited as ABA JOINT COMM.]; NAC, *supra* note 3, at 141-47; note 6 *supra*.

The corrections system is largely hidden from public view except in unusual circumstances such as a prison riot, an escape, or a subsequent offense by a person released from confinement. In more recent years the courts have brought to public view the harsh and inhumane conditions that exist in many correctional institutions. Against this background three general observations governed the nature of the reform proposals contained in the Model Sentencing and Corrections Act.

A. The Need for Legislative Leadership and Responsibility

Most proposals for sentencing and correctional reform have recognized the need for legislative leadership if meaningful reform is to take place.[18] State legislative codes governing these critical functions of state government are in many cases sorely outdated. Many provide little authority to the correctional staff to take progressive action; on the other hand, they provide few restraints on administrative power, restraints necessary to protect persons subject to correctional programs. In sentencing, legislatures have largely abandoned to the courts and boards of parole not only the responsibility to impose the appropriate sentence in individual cases but also to adopt principles for sentencing generally.

This abdication of legislative leadership has had undesirable results throughout the criminal justice system. The failure to articulate through the political system the purposes and principles of sentencing has resulted in a lack of public confidence in the sentencing process. The wide disparities in sentences, the lack of articulated premises and the apparent ineffectiveness of sentencing practices are difficult to explain to the body politic. The failure to maintain a sentencing system that can be rationalized to the general public has forced the public to respond to the perceived "crisis" in crime on an emotional level. Calls for harsher, longer or mandatory sentences for certain serious offenses are symptomatic of this lack of confidence.

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[17] In 1968 the American Bar Association found that twenty-one states authorized appellate sentencing review. ABA Sentencing Standards, *supra* note 5, at 13. It was concluded, however, that in only fifteen states was it realistically available in all cases. *Id.* Moreover, indeterminate sentencing schemes by their nature vest wide discretion in the sentencing court. Singer, *supra* note 7. Appellate review is thus made difficult because there is no standard against which to measure the exercise of discretion by the sentencing judge. *See, e.g.*, Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 Geo. L.J. 975, 1051-52 (1978).

[18] *See, e.g.*, NAC, *supra* note 3, at 143; ABA Joint Comm., *supra* note 16, at 588.

The failure of legislation to deal with the conditions in correctional facilities left the courts little choice but to intervene. But judicial intervention, while necessary and appropriate, resulted in disruption and uncertainty in correctional administration. As the National Advisory Commission recognized, reform by court decree is often disruptive, expensive and only partially effective.[19] The articulation of a code of conduct relating to the treatment of those convicted of crime by the legislature would reassert the leadership essential for substantial and wide-scale improvement in correctional practices. The Model Sentencing and Corrections Act is based on the assumption that legislative leadership in this area is necessary if true reform is to take place.

B. The Need for Specificity

A legislative framework for corrections should differ from traditional legislation establishing other administrative agencies. In many instances a lack of knowledge about human behavior requires that correctional decision-makers take risks and the public is less than sympathetic when those risks turn into realities. Indeed, programs for criminal offenders attract little sympathy from the public-at-large and are often perceived to be instances of "coddling criminals." Since the function of corrections is particularly controversial, correctional administrators have understandably been reluctant to implement programs of any far-reaching significance without specific legislative approval.

Legislation dealing with correctional reform must also take into account the unsavory side of the history of corrections in which there was a systematic denial of the rights and interests of confined persons.[20] The courts have found that conditions within prisons may constitute cruel and unusual punishment, and various practices have been held to violate other constitutional requirements.[21]

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[19] NAC, *supra* note 3, at 588.

[20] *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910); NAC, *supra* note 3, at 18. For examples of legislative responses to the exploitation of prisoner labor, see La. Rev. Stat. Ann. § 15:862 (West 1967); Me. Rev. Stat. Ann. tit. 34, § 555 (West 1978). *See generally* G. Rusche & O. Kirckheimer, Punishment and Social Structure 42, 65 (1939).

Both the need of correctional administrators for specific legislative support for programs and the need of convicted persons for legislative protection against excessive administrative power resulted in the Model Act being considerably more specific than most codifications. A legislative framework for correctional programs should be as specific as possible to support the correctional administrator in implementation and to assure the public that appropriate safeguards are provided for the public safety. A code of rights for convicted persons requires specificity since details cannot be left to administrative discretion when the provision is directed toward alleviating abuses or potential abuses of that very discretion. Thus, the Model Act contains many provisions that have considerable detail.

C. The Need for the Rule of Law in Sentencing and Corrections

The major approach of the Model Sentencing and Corrections Act is its attempt to impose the rule of law on the existing systems of sentencing and corrections. That attempt focuses primarily on the control and structuring of the discretion exercised by sentencing courts and correctional officials.[22] As indicated above, the traditional legal framework for sentencing and corrections left most decisions to the discretion of the decision-maker. Sentencing courts were free within only nominal boundaries to impose any sentence they thought appropriate. In a similar manner, correctional administrators were largely free from controls.

Much of the Model Act is based on the simple premise that there ought to be no outpost of lawlessness in a free society. The law is, in large measure, designed to protect the individual citizen from actual or *potential* governmental abuse. The Act is premised on the notion that there is nothing inherent in the processes of sentencing or corrections that ought to exempt either from that principle. It should be understood that this premise is not based on a perception that sentencing judges or correctional administrators systematically abuse their powers. Rather, the Act reflects the perception that legal constraints on governmental power are important to guard against potential abuse as well as to remedy instances of actual abuse.

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[21] *E.g.*, Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). *See generally* Alexander, *The Captive Patient: The Treatment of Health Problems in American Prisons*, 6 CLEARINGHOUSE REV. 16 (1972); Hirschkop and Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

[22] Many of the provisions of the Act are derived from long standing techniques utilized to regulate administrative discretion. *See* NAC, *supra* note 3, at 555 (Standard 16.2); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, at 179-81 (1967). *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969).

Application of the rule of law to sentencing and corrections requires a careful balance in order to insure that the governmental functions can be effectively conducted while at the same time subjecting official power to carefully drawn limits. It is to this balance that many of the provisions of the Model Act are addressed.

The discretion of sentencing courts is restrained by the establishment of legislative principles and purposes, and the enactment of sentencing guidelines which provide the court with a presumptively correct sentence. Although the court remains free to impose a sentence other than the presumptively correct one, it must then articulate its reasons for doing so, and its decision is subject to appellate review. The "protected interests" of confined persons in the correctional area are specifically announced, and the authority of the correctional administrator to limit or restrict the realization of these interests is limited to those situations in which a particular and compelling governmental interest is at stake.[23] In addition, techniques traditionally imposed on administrative agencies such as notice-and-comment rule making[24] and judicial review of decisions[25] are imposed on correctional agencies. All of these techniques have been used successfully with agencies dealing with citizens in the free world and should be equally available to convicted persons.

The imposition of the rule of law to sentencing and corrections was adopted as a basic premise of the Model Act primarily because a society that truly values liberty and individual rights can do no less. Secondarily, but nonetheless importantly, there is sufficient evidence to suggest that fairness within these systems will also make them more effective in performing their prescribed functions. An offender who believes himself to be the victim of an unprincipled sentencing system is unlikely to be receptive to correctional or rehabilitative programs. An offender who is treated unfairly or is forced to live in squalid and inhumane conditions is unlikely to develop the healthy respect for law and society that is required to live a crime-free life upon release. Adjustment to the free world upon release from confinement is likely to be effective only if the offender has learned, while confined, to accept the responsibilities and limits of living in a free society.

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[23] *See* text accompanying notes 77-78 *infra*.

[24] MSCA § 1-103 [Adoption of Rules; Procedures]. This section was patterned after the MODEL STATE ADMINISTRATIVE PROCEDURES ACT (1961), also promulgated by the Uniform Law Commissioners.

[25] MSCA § 1-104 [Judicial Review of Contested Cases]. This section was patterned after section 15 of the MODEL STATE ADMINISTRATIVE PROCEDURES ACT (1961). It permits judicial review on the administrative record and reversal of an administrative decision if it violates constitutional, statutory or administrative provisions or is in excess of departmental authority or is clearly erroneous or arbitrary and capricious.

Thus, while it might be argued that individual provisions of the Model Act may make the administration of correctional programs more difficult or more costly, it is the belief of the authors that in its totality the Model Act establishes a regime that is more compatible both with our traditional notions of justice and with an effective governmental response to criminal conduct.

III. MAJOR UNDERLYING THEMES

The Prefatory Note to the Model Act lists the following underlying themes of the Act:

> —The Act unifies the various elements of the correctional system into one department of corrections in order to coordinate the deployment of scarce correctional resources and to make correctional programs consistent and effective.
>
> —The Act implements the legislative responsibility for determining basic correctional purposes and policies and, in several sections, legislatively established criteria and goals for decision-making are announced.
>
> —The Act seeks to reduce the unfairness and ineffectiveness occasioned by sentencing disparity. Rehabilitation is eliminated as a goal of sentencing. Sentences, based on the punishment deserved for the offense, are determined by courts in accordance with statutory and administrative guidelines. Appellate review of sentences is authorized. Parole is abolished.
>
> —Although rehabilitation is no longer a factor in determining sentences, within the sentence imposed the Act seeks to enhance the rehabilitative potential of correctional environments by authorizing a wide variety of programs and giving offenders a greater voice in, and accordingly a greater incentive for, their own self-improvement.
>
> —The Act also seeks to recognize the interests of victims in the sentencing and correctional process.
>
> —Most importantly, the Act strives to bring justice and the rule of law to the correctional process.[26]

In addition to these basic policy approaches each major Article of the Model Act was built on one or two major themes. The Act consists of six articles. Article 1 includes general provisions and rule-making procedures.[27] Article 2, providing for creation of a state-wide Department of Corrections, establishes general organizational provisions designed to leave maximum opportunity for administrative flexibility in fashioning a detailed organizational structure to implement the substantive provisions of the Act. Article 3 describes the fundamental policies behind the sentencing provisions and sets forth the available sentencing alternatives and procedures designed to effectuate these policies. Article 4 provides a code of treatment of offenders, including an articulation of the protected interests of confined persons. Article 5 establishes procedures to assist victims of criminal offenses. Article 6 governs the transition from prior law to the provisions of the Act.

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[26] MSCA at 5-6.

[27] In many instances throughout the Act the director is obligated to exercise his discretion through formally adopted rules. The procedure for adopting rules allows participation by persons subject to the rules. The existence of rules will facilitate uniform application of policies throughout the department and provide a measure of protection against arbitrary action by subordinates. The public nature of the rules will assist in creating a greater public awareness of the operation of the department.

A. Establishment and Unification of Correctional Systems—Article 2

The provisions of Article 2 of the Model Act relate to the organization of the correctional system and the allocation and regulation of administrative authority. The thrust of the Article is to improve correctional programs, services and facilities. Although it is recognized that statutory provisions alone cannot insure effective corrections, a sound legislative framework is a prerequisite to the administrative development of a workable program.

The major policy position implemented in the Act with respect to organization is the unification of all adult correctional programs under one department of corrections. Historically, correctional agencies and, thereby, correctional programs, have been fragmented within a jurisdiction with no overall direction.[28] Until recently, in many states each correctional facility operated as an independent governmental agency subject only to general supervision by a board of corrections. In many states community-based programs such as probation and parole are administered separately from the facility-based correctional agency. In most states misdemeanant and pretrial detention facilities are operated by local law enforcement agencies. Consistent with most national studies of correctional systems, Article 2 and other provisions of this Act seek to bring all adult correctional programs within one agency—a unified department of corrections.[29]

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[28] This situation is changing. In fact, several legislative formulations proposing various levels of unification served as models for the development of some of Article 2. *See* Unified Code of Corrections, ILL. ANN. STAT., ch. 38, §§ 1001-1-1 to 1008-5-1 (Smith-Hurd 1973); Nebraska Treatment and Corrections Act, NEB. REV. STAT. §§ 83-170 to -1,135 (Reissue 1976); Advisory Comm'n on Intergovernmental Relations, State Dep't of Correction Act (1971); MODEL PENAL CODE § 401; NATIONAL COUNCIL ON CRIME AND DELINQUENCY STANDARD ACT FOR STATE CORRECTIONAL SERVICES (1966).

[29] *See* NAC, *supra* note 3, at 560 (Standard 16.4). *See also* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 55 (1971) (unification of all programs except local jails);

At present twenty-two states have placed administrative authority over adult probation, parole and correctional institutions in one state agency, although some retain overlapping local probation systems.[30] Four states place these three programs in three separate agencies.[31] The breakdown between state and local responsibility for various aspects of the correctional system is shown in the following table:

Number of Jurisdictions with Indicated Responsibilities[32]
(Fifty States, D.C., Canal Zone & Puerto Rico)

Program	Local Resp.	State Resp.	State/Local Resp.
Juvenile detention	43	8	2
Juvenile probation	26	8	19
Juvenile institutions	0	50	0
Juvenile aftercare	4	47	2
Misdemeanant probation	13	19	9
Adult probation	9	32	12
Jails	43	9	1
Adult institutions	0	53	0
Adult parole	0	53	0

The arguments in favor of unification are based on notions of effectiveness and efficiency. Correctional programming should be consistent and coordinate, particularly when the same individual often is subject to more than one element of the correctional system. An offender subject at relatively short intervals to pretrial detention, probation and confinement should not confront inconsistent philosophies or expectations. His gradual reintegration into the free society may require an overall program that builds on past experience.

Consolidated authority over correctional programs will also allow the efficient utilization and allocation of scarce resources. In many instances professional counselors can assist confined persons as well as persons on supervision in the community. Consolidation also provides economies of scale which allow greater

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American Correctional Ass'n, Manual of Correctional Standards 151-170 (3d ed. 1966).

30. American Correctional Ass'n Directory (Juvenile and Adult Correctional Departments, Institutions, Agencies and Paroling Authorities) (1975-76) at 250-57.

31. *Id.* at 257.

32. *Id. See also* California Bd. of Corrections, Coordinated California Corrections: The System (1971); Final Report of the Prison Study Comm., A Unified System of Correction (Conn. 1957). Many states report plans for further unifying correctional activities. Law Enforcement Assistance Administration, Recent Criminal Justice Unification, Consolidation and Coordination Efforts (Jan. 1976).

flexibility in providing programs and services. Finally, unification facilitates long-range planning, the development of training and personnel programs, and the research and evaluation of past efforts.

In keeping with the nature of a model law designed for implementation in fifty states, the organizational structure of the department was kept flexible. The Act creates four divisions within the department of corrections and two independent offices. The program-based divisions—division of facility-based services,[33] division of community-based services,[34] and division of jail administration[35]—are created primarily as legal devices to regulate sentencing practices. Article 3 requires that offenders be sentenced to a particular division within the department. The director is, however, authorized to appoint a single person as associate director of more than one division and to otherwise coordinate the activities of the division.[36] This may be particularly appropriate in small states.

The fourth division, the division of medical services,[37] which provides medical services to persons in the custody of the department, is created as a separate division for substantive reasons. Delivery of medical care to confined persons often comes into conflict with the security and administrative needs of facilities. The separate division provides medical personnel with some independence from facility administrators while at the same time retaining departmental control and responsibility for medical services.

The effectiveness of the office of correctional legal services,[38] which provides legal services for persons in the custody of the department, depends on its independence from direct supervision by the department of corrections. The office staff may have to contest actions of departmental personnel; yet, they must retain the confidence of the correctional administration as well as that of persons in the custody of the department. The effectiveness of the office requires an independence from—and the confidence of—both employees and confined persons.

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[33] MSCA §§ 2-301 to -303. This division administers programs, services and facilities primarily for felony offenders sentenced to continuous confinement. MSCA § 2-301.

[34] MSCA §§ 2-201 to -204. This division administers programs, services, and facilities for persons sentenced or transferred to its custody, pretrial releases and victims. MSCA § 2-201.

[35] MSCA §§ 2-401 to -405. This division administers programs, services and facilities primarily for misdemeanants sentenced to continuous confinement and pretrial detainees. MSCA § 2-401.

[36] MSCA § 2-106(2).

[37] MSCA §§ 2-501 to -503. The right of a confined person to receive medical care is a protected interest. MSCA § 4-105 [Medical Care]. *See also* MSCA §§ 4-106 [Right to Healthful Environment] and 4-107 [Physical Exercise].

[38] MSCA §§ 2-601 to -603. The right of a confined person to receive legal assistance is a protected interest. MSCA § 4-108 [Legal Assistance]. *See also* MSCA §§ 4-109 [Participating in the Legal Process] and 4-110 [Access to Legal Materials]. The other independent office created by the Act is that of Correctional Mediation. MSCA §§ 4-201 to -207.

Beyond these provisions, the director is given full authority to organize the department and to create additional divisions. Larger systems, for example, may develop separate divisions for research, planning, purchasing, administration or other activities.

The second major purpose of Article 2 is to allocate and regulate correctional authority. Historically, the legislative delegation of authority to correctional administrators has been framed in relatively broad language. Indeed, in some jurisdictions facilities or agencies are created and their operation left to administrative discretion without further guidance. This type of statutory foundation can have adverse effects. First, left without legislative guidance or support, some correctional administrators may be hesitant to attempt to implement new and promising ideas for fear of public or legislative discontent or from doubt as to the limits of their authority. Second, without legislative direction, the thrust of correctional programming over time will be erratic, and each new change in administration will bring its own method of operation based on its own perception of public policy. Third, legislative restraint on administrative discretion is necessary to insure that persons in the custody of the department are treated fairly.

Article 2 contains provisions to confine, structure and check administrative discretion without unduly interfering with the flexibility and authority needed to administer correctional facilities and programs effectively. In some provisions, goals are legislatively established and relevant considerations and factors for decision-making are stated.[39]

1. *Overview of Article 2*

Part 1 of Article 2 establishes the centralized department of corrections and provides for its authority and responsibilities. Provisions in this part have general application throughout the programs of the department. Parts 2, 3 and 4 create the operational divisions of the department. The division of facility-based services has responsibility for major correctional facilities including prisons and other long-term confinement institutions. The division of community-based services provides a cluster of programs and services that have a general community orientation. It is this division that has custody over persons sentenced to community supervision. It might also have administrative responsibility for halfway houses and other facilities not used for continuous confinement. The jail administration division would govern those facilities traditionally thought of as local jails, including pretrial detention facilities and misdemeanant confinement institutions. Part 5 establishes a division of medical services responsible for all aspects of medical services in departmental facilities. Part 6 establishes an independent office of correctional legal services to provide legal assistance to confined persons. The office is authorized to provide both legal counsel and paralegal assistance. Part 7 provides legislative direction for the planning and design of new correctional facilities.

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[39] MSCA §§ 2-701 to -706 [Facility Design and Construction].

B. Sentencing—Article 3

Article 3 contains provisions relating to the selection, imposition, and execution of sentences for violation of criminal laws. The major policy decisions reflected in the Article are: 1) the recognition of just deserts rather than rehabilitation or individual predictions of dangerousness as the major factor in sentencing and release decisions;[40] 2) the reduction and structuring of judicial sentencing discretion by establishment of a presumptively appropriate sentence to be imposed unless there is good cause not to do so;[41] and 3) the adoption of a flat sentencing system for sentences to confinement by abolition of parole.[42]

For many years the American system of sentencing has sought to achieve four goals: deterrence, rehabilitation, incapacitation, and retribution. Both the American Bar Association and the American Law Institute have proposed that all of these goals are legitimate considerations in appropriate cases.[43] This multi-goal system of sentencing has resulted in variations on one basic model within the states—judicial imposition of an indeterminate sentence and discretionary release by a parole board. This model sought to promote individualized treatment of offenders ("let the punishment fit the criminal not the crime"), to limit the coercive power of the state by requiring a utilitarian rather than a retributive end and to protect society by applying just the right amount of coercion and cure to produce law-abiding citizens and to deter others from criminal behavior.

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[40] MSCA at 89.

[41] *Id.*

[42] *Id.*

[43] ABA SENTENCING STANDARDS, *supra* note 5, § 2.2; MODEL PENAL CODE § 305.9. *See also* NAC, *supra* note 3, at 150 (Standard 5.2); NAT'L COUNCIL ON CRIME & DELINQUENCY, MODEL SENTENCING ACT (2d ed. 1972). The American Bar Association recently moved in the direction of the Model Act. ABA SENTENCING STANDARDS (SECOND), § 2.2 (tent. draft 1979) (approved at the 1979 Annual Meeting).

The model also had practical advantages in administering correctional institutions. The parole release discretion provided a safety valve for overcrowded prisons. The system also allowed sentencing courts to impart relatively long sentences to satisfy public opinion while allowing the parole board to award early release to keep sentences within reasonable limits.

Recent examinations of the results of the sentencing system have called into question both its practical effectiveness and its theoretical justification.[44] The thrust of the criticisms has been three-fold: 1) the current system does not allow effective use of deterrence principles and yet it neither rehabilitates offenders nor isolates offenders likely to commit future crimes;[45] 2) the current system results in large scale disparity in sentences creating frustrations, tensions, and disrespect for the system in both the offenders and the public-at-large;[46] and 3) the current system is philosophically unjust in that it oftentimes severs the relationship between the punishment imposed and the offense committed.[47]

The provisions of Article 3 reflect the use of "just deserts" as the overriding philosophy justifying the imposition of criminal sanctions. This philosophy requires that the nature and severity of the sanction imposed be deserved on the basis of the offense committed and certain limited mitigating and aggravating factors relating to the offense and the offender. This seeks to avoid the injustice that results from utilizing the other traditional purposes of punishment.

The use of rehabilitation as a relevant factor in sentencing has been accused of causing substantial disparity in sentencing:

> [I]f rehabilitation is the goal, and persons differ in their capacity to be rehabilitated, then two persons who have committed precisely the same crime under precisely the same circumstances might receive very different sentences, thereby violating the offenders' and our sense of justice. . . . Rigorously applied on the basis of existing evidence about what

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[44] For arguments and proposals for change reflecting the primary theoretical basis for the philosophy embodied in Article 3, see American Friends Service Committee, Struggle for Justice (1971); Citizens' Inquiry on Parole and Criminal Justice, Prisons Without Walls (1975); D. Fogel, *supra* note 6; M. Frankel, *supra* note 6; D. Lipton, R. Martinson & J. Wilks, The Effectiveness of Correctional Treatment (1975); N. Morris, *supra* note 6; Twentieth Century Fund, *supra* note 6; A. von Hirsch, *supra* note 6; Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. Va. L. Rev. 263 (1975); McGee, *A New Look at Sentencing* (pts. 1-2), Fed. Probation, June 1974, at 3 and Sept. 1974, at 3.

[45] MSCA at 90.

[46] *Id.*

[47] *Id.*

> factors are associated with recidivism, this theory would mean that if two persons together rob a liquor store, the one who is a young black male from a broken family, with little education and a record of drug abuse, will be kept in prison indefinitely, while an older white male from an intact family, with a high school diploma and no drug experience, will be released almost immediately. Not only the young black male, but most fair-minded observers, would regard that outcome as profoundly unjust.[48]

Recent studies have also called into question the effectiveness of coerced rehabilitation programs.[49] Moreover, the rigidly structured environment of a prison does not provide a suitable educational experience for learning how to exist in a free society.[50] And even if rehabilitation worked, the justification for extending a sentence for rehabilitative purposes, beyond what was "deserved" for the offense committed, breaks the tie between offense and sanction, thus removing the offense as the justification for intervention into the life of the offender. The full implication of governmental intervention into the lives of its citizens unrelated to commission of a criminal offense runs counter to the traditional and related values of individual freedom and limited governmental power.

The abandonment of rehabilitation as a factor in determining the nature or length of a sentence *does not* abandon rehabilitation as a goal of the correctional system. Rather, within the just-deserts sentence imposed, the Act requires that offenders be provided with programs and services to better themselves.[51] Thus, the Act permits offenders to choose whether and in what programs they will participate.

Another traditional goal of punishment has been to restrain or incapacitate those offenders predicted as likely to commit future crimes. This goal has been implemented for the most part through the parole system in which the parole board is authorized to release offenders from confinement when they are no longer dangerous or have been rehabilitated. In addition many systems provide enhanced sentences for those predicted to be dangerous. Although the theory of the system is plausible, in practice attempts to predict dangerousness have not been successful. The knowledge necessary to predict who will commit future crimes is undeveloped. As Professor von Hirsch noted: "With a predictive instrument of so little discernment and a target population so small, the forecaster will be able to spot a significant percentage of the actual violators *only if a large number of false positives is also included*."[52] This results in the unnecessary confinement of many offenders in order to isolate a few who are dangerous. The unreliability of our methods of prediction and the tendency to greatly overpredict likely recidivism suggests that predictive restraint should not be used to determine the nature or severity of the sanction imposed.

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[48] J. Wilson, Thinking About Crime 171 (1975).

[49] *E.g.*, D. Lipton, R. Martinson & J. Wilks, *supra* note 44.

[50] *See* D. Glaser, The Effectiveness of a Prison and Parole System (1964).

[51] *See* text accompanying notes 75-76, 106 *infra*.

[52] A. von Hirsch, *supra* note 6, at 22 (emphasis in original).

Within the limitations of the deserved punishment, deterrence of others is an appropriate goal to pursue. The present system largely relies for deterrent effect on the existence of an undifferentiated criminal sanction. Our knowledge and ability to fine tune the sentencing system for deterrence purposes is not well developed.[53] In part, this results from the individualized treatment model which prevents any informed knowledge of criminal sanctions from being imparted to the public. The deterrence impact of a legislative increase in a sentence for a particular offense is largely muted by the discretionary sentencing practices of courts and parole boards.

Discretionary release systems like parole also have counterproductive effects on the lives and attitudes of offenders. Persons subject to a parole board's discretion inevitably participate in a "con game" to convince the board they are ready for release. In addition, the uncertain nature of the sentence prohibits careful planning for release. Perhaps more important, however, the parole system intensifies disparity in sentences. This, in turn, creates tension and hostility within correctional institutions and thus makes actual rehabilitation more difficult.

Perhaps the major indictment of the current system is that it has lost public confidence. The sentencing system purports to do more than it can deliver—it claims to rehabilitate, isolate, and deter and thus attracts the blame for publicized crimes by ex-offenders and for the perceived increase in crime generally. The provisions of Article 3 attempt to speak to the concerns expressed with current sentencing provisions.[54] They are directed by the overriding attempt to reduce injustice and to implement a modest, attainable system of sentencing criminal offenders.[55]

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[53] F. Zimring & G. Hawkins, Deterrence (1973).

[54] The acceptance of the need for basic systematic change in criminal sentencing is reflected in current legislative responses. Indiana and Maine have enacted flat sentencing systems by eliminating parole in most instances. Ind. Code Ann. §§ 35-50-2-4 to -7 (Burns 1977); Me. Rev. Stat. Ann. tit. 17-A., §§ 1253, 1254. California has both enacted a presumptive sentencing system and abolished discretionary release. Cal. Penal Code §§ 1170 to 1170.6 (West Supp. 1979). The Federal Parole Commission and Reorganization Act of 1976, 18 U.S.C. §§ 4201-4218 (1976), made mandatory an earlier administrative decision to establish presumptive parole dates for federal prisoners. Further, state legislatures are considering various forms of presumptive and flat sentencing proposals in, among others, Minnesota, Illinois, Ohio, Alaska and New Jersey. In addition to such legislative responses, several courts are experimenting with sentencing guidelines. *See* L. Wilkins, J. Kress, D. Gottfredson, J. Calpin & A. Gelman, Sentencing Guidelines: Structuring Judicial Discretion (1976).

1. *Overview of Article 3*

Part 1 of Article 3 establishes the general framework for sentencing. The purposes and principles of sentencing are articulated in sections 3-101[56] and 3-102[57] of the Act. Section

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[55] This goal is also reflected in the modified flat sentencing plan approved by the ABA Joint Committee on the Legal Status of Prisoners. ABA JOINT COMM., *supra* note 16, § 9.1.

[56] MSCA § 3-101 [Purposes].

The purposes of the Article are to:

(1) punish a criminal defendant by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;

(2) assure the fair treatment of all defendants by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences; and

(3) prevent crime and promote respect for law by,

(i) providing an effective deterrent to others likely to commit similar offenses;

(ii) restraining defendants with a long history of criminal conduct; and

(iii) promoting correctional programs that elicit the voluntary cooperation and participation of offenders.

[57] MSCA § 3-102 [Principles of Sentencing].

To implement the purposes of this Article the following principles apply:

(1) The sentence imposed should be no greater than that deserved for the offense committed.

(2) Inequalities in sentences that are unrelated to a purpose of this Article should be avoided.

(3) The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed.

(4) Sentences not involving confinement should be preferred unless:

(i) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(ii) confinement is necessary to avoid depreciating the seriousness of the offense or justly to punish the defendant;

(iii) confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses;

(iv) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant; or

(v) the purposes of this Article would be fulfilled only by a sentence involving confinement.

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should not be considered in determining the sentence alternative or length of term to be imposed, but the length of a term of community supervision may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence.

(6) The prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct or acts

3-103[58] describes the sentencing alternatives, and the maximum possible sentences for categories of offenses are established in Section 3-104.

A Sentencing Commission is created[59] to develop sentencing guidelines.[60] Once created, these guidelines will provide the presumptively appropriate sentence to be imposed in each case based on statutorily authorized factors relating to the offender and the severity of the offense.[61] The guidelines will indicate the appropriate type of sentence, *i.e.*, fine, community supervision, periodic confinement, continuous confinement, as well as the length or magnitude of the sentence to be imposed.[62]

Part 2 of the Article establishes the procedures for imposing sentences. A presentence report is required in all felony cases,[63] but the court may order a shortened report where there are no con-

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designated as a crime under the law, should not be considered in determining his sentence alternative or the length of term to be imposed.

[58] MSCA § 3-103 [Sentencing Alternatives].

(a) A person convicted of a felony or a misdemeanor in this State must be sentenced in accordance with this Act.

(b) The following sentencing alternatives are authorized:

(1) payment of a fine either alone or in addition to any other sentence authorized by this subsection;

(2) service of a term of community supervision;

(3) service of a split sentence of confinement followed by a term of community supervision;

(4) service of a term of periodic confinement;

(5) service of a term of continuous confinement;

(6) making restitution alone or in addition to any other sentence authorized by this subsection.

(c) This Article does not deprive a court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose costs and other monetary obligations if specifically authorized by law.

[(d) This Article does not prevent a court from imposing a sentence of death specifically authorized by law.]

[59] MSCA § 3-110 [Sentencing Commission; Creation]. Locating in an administrative agency the obligation to develop presumptive sentences provides greater flexibility in the development and modification of sentences and assures continuing examination of sentencing practices.

[60] MSCA § 3-112 [Duties of Sentencing Commission].

[61] MSCA § 3-115 [Sentencing Guideline; Requirements]. The guidelines must be consistent with the purposes (MSCA § 3-101) and principles (MSCA § 3-102) of sentencing.

[62] MSCA §§ 3-113 [Sentencing Guidelines; Non-Monetary Sentencing Alternatives] and 3-114 [Monetary and Non-Monetary Conditions of Sentencing Guidelines].

[63] MSCA § 3-203 [Presentence Investigation and Report]. The court may order preparation of a presentence report in misdemeanor cases and, with the defendant's agreement, a presentence investigation may begin before adjudication of guilt. The report includes any victim's statement with respect to sentencing.

tested issues of mitigation or aggravation.[64] A sentencing hearing is required.[65] The sentencing court is obligated to impose the guideline sentence unless it finds that some other sentence would better serve the purposes and principles of sentencing.[66] If the court departs from the guidelines it must also enter on the record its reasons for so departing.[67] Finally, appellate review of sentences is authorized.[68]

Parts 3 through 6 of the Article provide statutory detail for the various types of sentences authorized by the Act. Part 3 implements sentences to community supervision. The Act uses the term "community supervision" as a substitute for what has traditionally been called "probation" and which refers to supervision in the community under conditions imposed by the court. Part 4 relates to fines.

Part 5 provides for the elements of a sentence to confinement. Three sentences involving confinement are authorized: split sentences, periodic confinement, and continuous confinement. Split sentences involve confinement for not more than 180 days followed by a term of community supervision.[69] Periodic confinement involves confinement only during specified days or parts of days and supervision in the community at other times.[70] A sentence for continuous confinement requires the offender to serve his entire sentence in a facility. There is no parole or other discretionary release, but each offender earns one day of good time for each day he serves in confinement without violating prison rules.[71] Good time credits are awarded neither for program participation nor on the basis of official judgments regarding rehabilitative progress; their forfeiture may be assessed as punishment in a disciplinary proceeding.[72] No supervision is provided after release from confinement, but the department is authorized to provide services and assistance to released offenders on a voluntary basis and to make funds available to them conditioned on their participation in post-release programs.[73] Part 6 authorizes the grant of restitution to victims.

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[64] MSCA § 3-204 [Requirements of Presentence Reports].

[65] MSCA § 3-206 [Sentencing Hearing]. The victim is afforded the opportunity to be heard at the hearing.

[66] MSCA § 3-207 [Imposition of Sentence]. The requirement that the court show a sentence that deviates from the guidelines is *better*, not just appropriate, places a substantial burden on the sentencing judge if he does not impose the guideline sentence.

[67] *Id.* An articulation of reasons makes appellate review more practical.

[68] MSCA § 3-208 [Appellate Review of Sentences]. Appellate review may be sought by either the defendant or prosecutor and the appellate court may increase as well as reduce the sentence imposed.

[69] MSCA § 3-503 [Split Sentence]. Split sentences are subject to good time reductions. *Id.* § 3-501(c). Thus, the 180-day maximum reflects a 90-day maximum of "real" time. *Id.* § 3-501(b).

[70] MSCA § 3-504 [Periodic Confinement; Effect].

[71] MSCA § 3-501 [Sentences to Confinement; Good Time Reductions].

[72] MSCA § 4-502 [Punishments for Disciplinary Infractions]. Good time reductions of the sentence imposed are common in statutory schemes. *E.g.*, NEB. REV. STAT. § 83-1,107 (Reissue 1976). In many jurisdictions good time is auto-

C. Treatment of Offenders and Judicial Oversight—Article 4

Article 4 of the Model Act for the most part governs the treatment of those persons convicted of and sentenced for criminal conduct. It describes a system that protects the interests of confined persons, one in which such individuals are allowed to learn to accept the responsibilities of life in free society by being subjected to the same system of incentives and burdens experienced by free citizens. The article is built upon the basic premise that persons in the custody of the department have the right to be treated fairly. In part, support for the premise is philosophical—that the greatness of a society can be measured by the way it treats criminal offenders. In part, support for the premise is utilitarian—that fair treatment is a prerequisite for rehabilitation. In part, support for the premise is legal—that offenders are entitled under the Constitution to basic elements of fair treatment. Finally, in part, support for the premise is traditional—that governmental power should always be restrained, not necessarily because of proven abuse but because of the potential for abuse.

The withdrawal of liberty inherent in imprisonment or other less intrusive criminal sanctions is punishment. The provisions of the Model Act, particularly those of Article 4, reflect a refusal to add to the magnitude of that punishment by creating or maintaining harsh or insensitive correctional facilities or programs.[74] Rather, the Act creates a correctional environment approximating life outside the prison, with confined persons treated with dignity and as functioning adults capable of making and accepting responsibility for their own decisions. Reducing the pervasiveness of administrative control over the lives of confined persons is not wholly

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matically credited and may be forfeited only upon the commission of a disciplinary infraction. *Id.* Under the Model Act good time forfeiture may be imposed only if the disciplinary infraction is a felony or seriously jeopardizes safety or the confined person is a frequent rule violator. MSCA § 4-502. Generally a forfeiture of 90 days good time is the maximum that may be imposed for any one disciplinary infraction. *Id.*

[73] MSCA §§ 3-507 [Pre-release and Post-release Programs]; 3-508 [Release of Confined Persons]; and 3-509 [Released Offender Loan Fund].

[74] *See generally* ABA JOINT COMM., *supra* note 16; S. KRANZ, R. BELL, J. BRANT & M. MAGRUDER, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES 1-4 (1973) [hereinafter cited as MODEL RULES]; NAC, *supra* note 3, at 17-21.

an act of mercy; it is also a calculated act of self-protection that may be the most reasonable and efficient means to decrease recidivism,[75] since:

> [v]irtually all prisoners will some day be released to a society in which . . . they will daily be required to make choices and exercise self-restraint. If our institutions of confinement do not replace self-restraint for compelled restraint, and encourage choice rather than rote obedience, released prisoners will continue to be unable to deal with the "real" world.[76]

Article 4 represents a detailed codification of those interests of confined persons which ought to be protected. At the same time these "protected interests" are balanced against the legitimate interest of the public in assuring that the correctional system is administered in an orderly fashion, providing adequate security and safety to the public. This balancing is performed in two ways. First, a general provision stipulates the extent to which any "protected interest" of a confined person may be justifiably limited. Second, the details of each protected interest are specifically established, as reproduced below:

> **Section 4-102[77]**
>
> (a) Whenever this Act specifically provides a confined person with a "protected interest," the director shall take appropriate measures to preserve and facilitate the full realization of that interest.
>
> (b) The director may suspend or limit the realization of a protected interest otherwise provided by this Act during an emergency in a facility or part of a facility if the director finds that unusual conditions exist in a facility that imminently jeopardize the safety of the public or the security or safety within a facility and that extreme measures are necessary. The director shall rescind the suspension as soon as the emergency is over and, within 30 days after the emergency is over, submit to the Governor a written report describing the nature of the emergency and the measures taken.
>
> (c) Consistent with the provisions of this Part that specifically require or prohibit the performance of an act by the director, the director may adopt measures that:
>
> (1) limit the full realization of a protected interest if the measures are designed to protect the safety of the public or the security or safety within a facility; and
>
> (2) regulate the time, place, and manner of the realization of a protected interest if the measures are designed to assure the orderly administration of a facility.
>
> (d) Whenever the director adopts measures pursuant to subsection (c), they must be:
>
> (1) designed to create no greater restriction on the protected interest than reasonably necessary to accomplish the purpose for which they were adopted; and
>
> (2) adopted in accordance with the procedures established for the adoption of rules.

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[75] *E.g.*, ABA JOINT COMM., *supra* note 16, at 417-20.

[76] *Id.* at 418-19.

[77] MSCA § 4-102 [Protected Interests; General Provisions].

Subsection (a) of the section establishes an obligation on the Director of Corrections to take affirmative steps to assist confined persons to realize their protected interests. This reflects a recognition of the realities of prison life, where all control initially rests with the administration. Subsection (b) authorizes the suspension of protected interests during an emergency. Subsection (c) provides the major balancing of interests. Protected interests, specifically delineated in later sections of Article 4, can be limited if necessary "to protect the safety of the public or the security or safety within a facility"—a phrase used throughout the Act. The interest in orderly administration of a facility is not as imperative as security and safety and thus does not serve to justify limiting realization of protected interests except as to time, place and manner. The director's authority under this subsection is further circumscribed by specific directives and prohibitions contained in those sections establishing the protected interests.

Underlying the delineation of protected interests of confined persons is the philosophy adopted in several cases that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[78] The Special Committee recognized, on the other hand, that facility administrators must retain some discretion, particularly regarding matters of detail that do not raise significant issues of fair treatment. Each protected interest was described in order to: (1) assure minimum standards of fair treatment for offenders, (2) facilitate operation of facilities in a way that would afford confined persons protection beyond minimum standards, and (3) guard against the potential of administrative abuse. Each articulation of a protected interest was evaluated by asking two questions: (1) does it provide the specificity necessary to establish clear guidelines for operation; and (2) does it allow room for the administrator to take account of other legitimate institutional needs? Of course the interests of security and safety are always considered paramount institutional needs if it is demonstrated that they are legitimately involved.

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[78] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam). *Accord*, Morales v. Schmidt, 340 F. Supp. 544, 553-54 (W.D. Wis. 1972). *See* CAL. PENAL CODE § 2601 (West Supp. 1979).

To the extent the test described in the Model Act imposes the burden on correctional officials to justify their acts or regulations it has been rejected as a constitutional requirement by the United States Supreme Court in a case involving pretrial detainees. Bell v. Wolfish, 99 S. Ct. 1861 (1979), *rev'g*, Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), *rev'g in part*, United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977). Both the district court and the Second Circuit had adopted a test, similar to that of the Model Act, that required a showing that deprivations imposed on pretrial detainees were justified by "compelling necessities of jail administration." 573 F.2d at 124 (quoting Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974)). The Supreme Court adopted instead a requirement that the offender show by substantial evidence that the challenged administrative practice was excessive or arbitrary.

Wolfish was decided after adoption of the Model Act. However, as with other provisions in the Act, the National Conference of Commissioners on Uniform State Laws viewed constitutional requirements as minima and not necessarily as limiting the legislative perogative to direct the extent to which a correctional system might appropriately concern itself with administrative fairness. *Cf.* Jones v. North Carolina Prisoners' Labor Union Inc., 433 U.S. 119, 136-37 (1977) (Burger, C.J., concurring) (federal courts should not second guess the decisions of legislators and prison officials. Instead, the needed reforms must come from those with the most experience in the field, *i.e.*, prison administrators).

The most significant rights specified in Article 4 are those reflecting the basic needs of medical care,[79] legal assistance,[80] healthy and safe living conditions,[81] and those relating to the communications rights of confined persons.[82] Medical care and a safe living environment are fundamental rights of the human condition; their specification is necessary because of the unfortunate history of many of our correctional institutions, a history that has compelled courts to close facilities because living conditions were found to be cruel and unusual punishment under the eighth amendment.[83] The communication rights, as exemplified in mail and visitation rights, permit a confined person to keep in touch with the outside world. This is important because it leads to the confined person's better adjustment to prison life as well as to his better readjustment to life outside.[84] Keeping in touch and thus maintaining ties with the outside world is thought to be an extremely important factor in preventing recidivism.[85] The right to legal assistance is basic to assure that other rights specified in the act are protected.

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[79] MSCA § 4-105 [Medical Care].

[80] MSCA § 4-108 [Legal Assistance]. *See* MSCA §§ 4-109 [Participating in the Legal Process] and 4-110 [Access to Legal Materials]. *See also* Potuto, *The Right of Prisoner Access: Does* Bounds *Have Bounds?*, 53 Ind. L.J. 207 (1978).

[81] MSCA §§ 4-104 [Physical Security] and 4-106 [Right to Healthful Environment]. *See* MSCA § 4-107 [Physical exercise].

[82] Communication rights include communication by whatever manner—mail, telephone, face-to-face through visitation, etc., as well as the ability to be kept apprised of the outside world through books, magazines and television. *See* MSCA §§ 4-114 [Communications], 4-115 [Visitation], 4-123 [Lending Library; Reading Material; Radio and Television], and 4-124 [Facility News Medium].

[83] *See, e.g.*, Puch v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976). *See also* note 21 *supra*.

[84] Association of State Correctional Administrators, Policy Guidelines (1972); Fox, *The First Amendment Rights of Prisoners*, 63 J. Crim. L.C. & P.S. 162, 173-74 (1972).

[85] *See, e.g.*, N. Holt & D. Miller, Explorations in Inmate—Family Relationships (1972); N. Morris, *supra* note 6.

A careful analysis of Section 4-114 (dealing with oral and written communications) and its relationship to other sections, may help clarify the way in which a balance is struck between the exercise by a confined person of a right specifically afforded him under the Act, in this instance, communications, and the interests of security, safety, and orderly administration, which are also preserved.

Section 4-114[86]

(a) A confined person has a protected interest in communicating privately with other persons by means of oral and written communication.

(b) The director shall:

(1) provide, at the department's expense, to each confined person a reasonable amount of stationary and writing implements;

(2) promptly transmit, at the department's expense,

(i) all written communications from a confined person to his attorney, the director, the correctional mediator, or any federal or state court having jurisdiction over a legal matter in which he is involved;

(ii) a reasonable number of written communications from a confined person to the Governor and members of the [Legislature];

(iii) up to 5 additional one-ounce written communications per week from the confined person to other persons; and

(iv) all written communications delivered to the facility and addressed to the confined person; and

(3) provide confined persons with access to telephones and permit a confined person to place and receive emergency telephone calls and those to or from his attorney.

(c) The director may not:

(1) limit the number of written communications that may be sent by a confined person at his own expense or received by him;

(2) limit the persons with whom a confined person exchanges written communications except pursuant to section 4-118; or

(3) limit to less than 2 the number of 3-minute nonemergency telephone calls a confined person may place weekly at his own expense.

(d) Notwithstanding subsection (c), if a confined person sends more than 10 written communications per week beyond those sent at the department's expense or a confined person receives more than 10 written communications per week in response to any act of the confined person designed to result in a large number of written correspondence, the director may require the confined person to pay the costs of processing the additional correspondence.[87]

Pursuant to this section, a confined person is entitled to at least two telephone calls weekly and, subject to specified limitations, may also have unlimited correspondence at his own expense with anyone with whom he chooses to communicate; "approved" correspondents lists are, therefore, rejected.[88] The confined person is also assured correspondence at public expense both to guarantee him [(b) (2) (iii)] some access to the outside world[89] and to guarantee him access for particularly important purposes[90] [(b) (2) (i) and (ii)]. The thrust of the section is, therefore, far-reaching. On the other hand, the specification of "reasonable" as to the amount of stationery to be provided[91] [(b) (1)] and as to written communications to the Governor and members of the legislature[92] [(b) (2) (ii)], as well as the inclusion of subsection (d) in its entirety, were thought necessary to assure orderly administration of the facility. These provisions, in other words, permit correctional administrators to protect against abuse of communication rights by confined persons.

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[86] MSCA § 4-114 [Communications].

[87] *Id.*

[88] Several authorities recommend providing a right to send and receive letters from or to any person. *E.g.*, AMERICAN CORRECTIONAL ASSOCIATION COMMISSION ON ACCREDITATION STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 4305, 4341 (1977) [hereinafter cited as ACA STD.]; ABA JOINT COMM., *supra*

Subsection (d) also illustrates another approach used throughout the act. Under current practices it is widely perceived that many confined persons abuse the rights accorded them. Providing legal assistance or access to courts will result in frivolous as well as meretorious law suits. This results from the fact that the exercise of their rights often costs confined persons nothing since their opportunity for alternative activities is virtually nonexistent. As long as they are deprived of sources of income, a policy of direct monetary charges comparable to free world conditions is unsuitable. Thus, the Model Act attempts to provide to each confined person a realistic opportunity to earn money in order to duplicate, to the extent possible, real-world conditions within facilities. Confined persons are then obligated to pay for the exercise of interests that go beyond those minimum standards to which each confined person is entitled.

The section also provides[93] [(c) (2)] that there may be no limitation on the persons with whom a confined person may correspond except pursuant to Section 4-118. Section 4-118 permits such limitation when the correspondant knowingly violates institutional correspondence rules and interceptions of communications are not feasible.[94]

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note 16, § 6.1; MODEL RULES, *supra* note 74, at 46 (Rule IC-1); NAC, *supra* note 3, at 66-69 (Standard 2.17). Several departments of corrections have adopted such a policy. *E.g.*, ILL. ANN. STAT. ch. 38 § 1003-7-2(d) (Smith-Hurd 1973); Ill. Correc. Ad. Reg., Adult Div'n, § 823 (1975).

[89] Several departments of corrections presently provide free mailing. *E.g.*, Manual for Alaska St. Adult Corrections Inst., § 705 (1972); Ad. Plan Manual, N.J. Div. of Corrections and Parole Standards 291.277 (1975); Pennsylvania Bureau of Corrections Ad. Directive BC-ADM 803 (1972).

[90] MSCA § 4-114, Comment.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] MSCA § 4-118 [Limiting Visitors and Correspondents].

(a) The director may issue an order that:

Another example of the attention paid to the safety and security factors in the delineation of communication interests is Section 4-117 (Searches and Interception of Communications).[95]

Section 4-117[96]

(a) The director may authorize the opening and search for contraband or prohibited material of an envelope, package, or container sent to or by a confined person. This subsection does not authorize the interception of written communications.

(b) The director may permit the interception of communications:

(1) upon reliable information that a particular communication may jeopardize the safety of the public or security or safety within a facility;

(2) in pursuance of a plan formulated by the chief executive officer of each facility for conducting random interception of communications by or to confined persons which plan must be approved by the director as providing the least intrusive invasion of privacy necessary to the safety of the public and security and safety within a facility; or

(3) when otherwise authorized by law.

(c) Notwithstanding subsection (b), a communication may not be intercepted except pursuant to a court order or unless authorized by law if the communication is one which reasonably should be anticipated to be:

(1) a privileged communication between a confined person and his attorney, clergyman, or physician; or

(2) between a confined person and the Governor, Attorney-Gen-

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(1) prevents a specific person from communicating with a confined person if,

(i) the person seeking to communicate with a confined person knowingly has violated the rules relating to communication with confined persons, and

(ii) less restrictive measures, such as intercepting communications between the person and confined persons, are not feasible.

(2) prevents a specific person from entering facilities or visiting confined persons if,

(i) the person has in the past knowingly violated the rules of a facility relating to visitation; or

(ii) the director has reliable information that if admitted to the facility, the person is likely to advocate unlawful acts or rule violations that jeopardize the safety of the public or security or safety within a facility.

(b) A person against whom an order is issued is entitled to a written statement of the basis for the order, an opportunity to contest the order at a hearing before the director or his delegate, and judicial review.

(c) A confined person affected by an order issued pursuant to this section must be informed in writing of the order, the person against whom it is issued, and the specific reason for the order.

(d) An order pursuant to this section may not continue for more than 180 days without further evaluation.

[95] MSCA § 4-117. Searches of correspondence are treated separately from searches of persons and physical facilities. For provisions governing the latter, see MSCA § 4-119 [Searches]. For a provision requiring notice and disclosure of all searches, see MSCA § 4-120 [Searches and Interceptions; Notice and Disclosure].

[96] MSCA § 4-117 [Searches and Interceptions of Communications].

> eral, members of the [Legislature], a member of the state judiciary, a member of the advisory committee, or a member of the sentencing commission.
>
> (d) Whenever the director is authorized by this Act to prevent a person from communicating with a confined person, the director, in lieu thereof, may authorize communications between the persons to be intercepted if both parties agree to the interception.
>
> (e) The chief executive officer shall designate specifically employees authorized to intercept communications.
>
> (f) If a written communication is intercepted, it thereafter shall be transmitted promptly to its addressee unless to do so would jeopardize the safety of the public or the security or safety within a facility. Only that part of the communication which jeopardizes the safety of the public or the security or safety within the facility may be excised.
>
> (g) The director shall maintain a record of each interception or excision of a communication which includes the date of its occurrence, the content thereof, the person authorizing the interception or excision and the factual basis for his doing so, and the name of the confined person involved.[97]

As in Section 4-114, this section strikes a balance between institutional security and the confined person's interest in the privacy of his communications.[98] The balance struck in this section protects communication rights beyond a constitutional minimum.[99] This is, of course, consistent with the Act's general approach to the treatment of confined persons, *i.e.*, to restrict the exercise of their rights and responsibilities as free citizens only when a provable conflict exists between the exercise of these rights and legitimate institutional interests. Furthermore, these restrictions are authorized only to the extent necessary to protect legitimate institutional interests.

Recognition and acceptance of the Act's general philosophy however, did not always guarantee uniform Committee sentiment with respect to the embodiment of this philosophy in specific draft language. Section 4-117, for example, while admittedly describing a standard beyond the constitutional minimum, does not go as far as several authorities recommend. These authorities believe that a confined person may exercise a much broader right than that afforded in this section without unduly affecting institutional security interests.[100] The Special Committee was aware of this position and discussed the particular provisions of this section and their relationship to the Act's general philosophy. There was doubt expressed as to whether outgoing communications could ever sufficiently implicate security or safety within the facility. There was also discussion as to whether, even if in isolated circumstances outgoing communications could affect security and safety, intercepting these outgoing communications represented a proper balance between security and safety interests when measured against: (1) the invasion of privacy inherent in intercepting communications; (2) the potential interference with the benefits derived by society and confined persons when confined persons keep in touch with family and friends in the free community; and (3) the administrative costs of a policy of intercepting outgoing communications.

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[97] *Id.*

[98] *See* Procunier v. Martinez, 416 U.S. 396, 413 (1974) ("the limitation of First Amendment freedoms [while incarcerated] must be no greater than is necessary or essential to the protection of the particular governmental interest involved.").

[99] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Wolff v. McDonnell, 418 U.S. 539 (1974) (state conceded it could not *read* attorney mail); Denson v. United States, 424 F.2d 329 (10th Cir. 1970) (per curiam), *cert. denied*, 400 U.S. 844 (1970); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.*, Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

An administrative decision to intercept outgoing communications requires the commitment of employee time and departmental funds. In fact, one explanation for the traditional limit by correctional authorities on the amount of prisoner correspondence is that the number of employee hours necessary to intercept all communications proved too expensive unless the number of communications were limited. The Special Committee ultimately decided that, since the Model Act expressly prohibits limitations on the number of communications (with the exception of the situation delineated in Section 4-114(d)) the proper balance between security needs and the interests of privacy would best be left to administrative discretion.

A review of the substantive provisions discussed with reference to Section 4-114 demonstrates a common approach taken throughout Article 4. In order to secure the fullest exercise of rights consistent with security and safety, the provisions are drafted to grant the right, or protected interest, in broad terms (*e.g.*, Section 4-114) and then to specify the standard by which a restriction of the right is authorized (*e.g.*, Section 4-118).[101] This approach places the burden on correctional administrators to justify restrictions of protected interests as necessary to assure security, safety, or orderly administration. It also requires them to show that the action taken is the least restrictive of the protected interest involved. Such a burden is appropriately placed on administrators given the significance of protected interests to confined persons, the potential constitutional imperatives underlying many of the interests protected, and the access of correctional authority to the information necessary to prove the justification for restricting protected interests.

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[100] *E.g.*, ACA STD., *supra* note 88, at 4343; ABA JOINT COMM., *supra* note 16, § 6.1; MODEL RULES, *supra* note 74, at 46-47 (Rule IC-1 to -2).

[101] This approach can also be seen within each section. For example, Section 4-114, as indicated, grants a broad right of communication to confined persons. Yet it also contains internal limitations on that right.

The structure of the Act facilitates meaningful judicial review of administrative action since it provides an articulated standard by which a court may evaluate administrative acts and decisions. It permits the rule of law to enter the closed door of the facility and assure itself that a fair and just system operates therein. Judicial review was provided not because it was felt that, otherwise, facilities would be administered poorly, evilly, or corruptly, but because, as was said in a related context, "to exclude any particular police activity from [judicial] coverage is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than say that it must be conducted in a reasonable manner."[102]

In order to achieve the goal of making prison life an approximation of life outside the walls, confined persons should be involved in decision-making processes concerning them. Thus, the Act provides a voucher program designed to allow confined persons to assume responsibility for selecting rehabilitative or educational programs for themselves.[103] It establishes grievance committees consisting of equal numbers of correctional employees and persons in the custody of the department.[104] It also protects a confined person's right to refuse to participate in educational, rehabilitative, recreational, or other "treatment" programs.[105] The policy choices reflected throughout the Act are to provide ample opportunities for confined-person self-improvement and to permit confined persons to decide for themselves in what programs, if any, they will participate. The attempt is to construct monetary or other free world incentives for participation in work and training rather than to force participation.[106] This policy choice is by no means a denigration of the positive benefits of participation in work, training, or other rehabilitative programs. It reflects, rather, the belief that forced rehabilitation creates resentment and is rarely productive of long-lasting results.[107]

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[102] Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 363-64 (1974).

[103] MSCA §§ 4-701 to -706.

[104] MSCA § 4-302 [Grievance Committees; Creation]. Requiring an equal number of employees and confined persons prevents participants from merely relying on power voting. These committees are one alternative grievance mechanism; the director is authorized to create others. MSCA §§ 4-301 to -307.

[105] MSCA § 4-126.

[106] MSCA §§ 4-801 to -816.

[107] *E.g.*, D. LIPTON, R. MARTINSON & J. WILKS, *supra* note 44.

The major exception to this approach is found in Section 4-808 (Required Work).

Section 4-808[108]

(a) A confined person may be required to keep his own living quarters clean and orderly.

(b) A confined offender may be required to perform general maintenance work in the facility and assist in providing other services essential to the administration of the facility such as food and laundry service.

(c) A confined offender may be required to work in a business, commercial, industrial, or agricultural enterprise operated by the department.

Gainful employment, of course, may be seen as a benefit to a confined person. Thus a right to refuse employment would be consistent with the policy choice throughout the Act that permits a confined person to refuse opportunities that benefit him. The decision to require confined persons to work, although seemingly inconsistent with this basic policy, reflects a decision reached by the Special Committee after much debate. The section was retained for two reasons. Some committee members felt that the benefits derived from employment by the confined offender and society may outweigh other interests and others felt that required work can be expected by a society[109] otherwise obligated to provide confined persons with the necessities of life.

The incentive for confined persons to better themselves through gainful employment is a significant underpinning to Article 4. There is a clear relationship between recidivism and the inability, upon release, to find and retain employment.[110] Developing adequate employment skills and habits upon release is a major priority of the Model Act and should be the goal of any correctional system.[111] However, in a 1974 study it was found that only four percent of all persons confined in state and federal facilities were participants in a work-release program while only eleven percent worked in prison industries.[112] Moreover, it has been noted that in the typical prison industry shop today "idleness, make-believe work, short work shifts, work interruptions, overmanned shops, and obsolete industrial methods, material and equipment do not enhance the job acquisition prospects of ex-inmate workers."[113] Part 8 of Article 4, Employment and Training of sonal, and political rights[124] and may not be discriminated against in seeking employment, professional or occupational licenses, or vocational or professional training unless a direct relationship, as defined in the Act, exists between the underlying offense and the job, license, or educational opportunity sought.[125] Several states now prohibit employment discrimination solely on the basis of a criminal record.[126] And several authorities urge the abolition of licensing requirements that act to restrict available employment choices for convicted persons.[127] The collateral consequences provisions round out the Act's employment provisions and make the goal embodied in the Act more realistic, *i.e.*, that offenders will be discharged from sentences with attitude and skills that will make recidivism less likely.

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[108] MSCA § 4-808 [Required Work].

[109] *See* Ericsson, Labor-Market Wages for Prisoners 2 (Dec. 1972).

[110] *See* D. GLASER, *supra* note 50, at 311-61; 6 ECON, INC., ANALYSIS OF PRISON INDUSTRIES AND RECOMMENDATIONS FOR CHANGE, STUDY OF THE ECONOMIC AND REHABILITATIVE ASPECTS OF PRISON INDUSTRY (Sept. 24, 1976) [hereinafter cited as ECON, INC.]

[111] *E.g.*, ABA JOINT COMM., *supra* note 16, §§ 44.1 to .4, and Commentary.

[112] Levy, Abrams & LaDow, Final Report on Vocational Preparation in U.S. Correctional Institutions, iii-iv (U.S. Dep't of Labor 1975).

[113] 6 ECON, INC., *supra* note 110, at 4. *See, e.g.*, NAC, *supra* note 3, at 583-84

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[124] MSCA § 4-1001 [Rights Retained].

[125] MSCA § 4-1005 [Discrimination; Direct Relationship].

> (a) This section applies only to acts of discrimination directed at persons who have been convicted of an offense and discharged from their sentence.
>
> (b) It is unlawful discrimination, solely by reason of a conviction:
>
> (1) for an employer to discharge, refuse to hire, or otherwise to discriminate against a person with respect to the compensation, terms, conditions, or privileges of his employment. For purposes of this section, "employer" means this State and its political subdivisions and a private individual or organization [employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year];
>
> (2) for a trade, vocational, or professional school to suspend, expel, refuse to admit, or otherwise discriminate against a person;
>
> (3) for a labor organization or other organization in which membership is a condition of employment or of the practice of an occupation or profession to exclude or to expel from membership or otherwise to discriminate against a person; or
>
> (4) for this State or any of its political subdivisions to suspend or refuse to issue or renew a license, permit, or certificate necessary to practice or engage in an occupation or profession.
>
> (c) It is not unlawful discrimination to discriminate against a person because of a conviction if the underlying offense directly relates to the particular occupation, profession, or educational endeavor involved. In making the determination of direct relationship the following factors must be considered:
>
> (1) whether the occupation, profession, or educational endeavor provides an opportunity for the commission of similar offenses;
>
> (2) whether the circumstances leading to the offense will recur;
>
> (3) whether the person has committed other offenses since conviction or his conduct since conviction makes it likely that he will commit other offenses;
>
> (4) whether the person seeks to establish or maintain a relationship with an individual or organization with which his victim is associated or was associated at the time of the offense; and
>
> (5) the time elapsed since release.
>
> (d) [The State Equal Employment Opportunity Commission has jurisdiction over allegations of violations of this section in a like manner with its jurisdiction over other allegations of discrimination.]

[126] *E.g.*, Conn. Gen. Stat. Ann. §§ 4-61n to -61r (West Supp. 1979); Fla. Stat. Ann. § 112.011 (West Supp. Pamphlet 1978); Hawaii Rev. Stat. § 378-2 (1976); Wash. Rev. Code Ann. § 9.96A.020 (West 1977).

1. *Overview of Article 4*

Part 1 contains a delineation of the most important protected interests that are retained by confined persons. They include basic needs and those rights mandated by courts to be provided to confined persons. They extend beyond these interests, however, to include free-citizen rights whose extension to confined persons is consistent with safety and security. By creating the office of correctional mediator, Part 2 provides one method to relieve tensions and mediate disputes within facilities. Part 3 requires the adoption of grievance procedures, another method to relieve tensions and permit a dialogue for change—when change is necessary—within facilities. Part 4 deals with the assignment, classification and transfer of persons in the custody of the department. Since these decisions have a substantial impact on the lives of confined persons, this part describes procedures by which these decisions must be made. Part 5 deals with discipline within facilities. It prescribes a code of presumptive punishments proportionate to the seriousness of the disciplinary infraction and thus reflects, for disciplinary matters, the same rationale that underlies the sentencing scheme of the Act. This part also affords procedural protections to the confined person charged with a disciplinary infraction. Part 6 deals with programs putting confined persons at risk. It reflects the belief that informed, confined-person consent is possible in a correctional setting that eliminates parole, earned good time, and coerced rehabilitation, and that provides real earning capacity to confined persons so that they have sources alternative to experimentation by which to obtain funds. Part 7 provides for a voucher program. The program is intended to increase the number and effectiveness of programs offered confined persons and to encourage confined persons to take full advantage of such programs by permitting them to choose those programs in which they will participate. Part 8 provides for the employment of confined persons at "real" wages and in a realistic work environment. It encourages provision of a full panoply of employment and vocational training opportunities and, in moving towards a goal of full employment for confined persons, permits employment of confined persons by private enterprise and payment of competitive wages. Part 9 deals with compensation for work-related offender injuries. Part 10 deals with the collateral consequences of a conviction. It acts to restore to an ex-offender those rights abridged by conviction or confinement and to protect him from employment discrimination when the employment he seeks is not directly related to the offense for which he was convicted. The part attempts to effect a full reintegration of the ex-offender into the free community.

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[127] *E.g.*, ABA JOINT COMM., *supra* note 16, §§ 10.1 to .7, and Commentary; NAC, *supra* note 3, at 592-93 (Standard 16.17 and Commentary); PRESIDENT'S COMM'N ON CORRECTIONS, *supra* note 116, at 90-91.

D. Interests of Victims—Article 5

The Special Committee initially decided to include victims' services within the ambit of the department of corrections and to encourage victims to participate in the sentencing process. Although victims have been described as the "real 'clients' of the criminal justice system,"[128] it is becoming increasingly apparent that their interests have been largely ignored by that system.[129] Under the Model Act the offender, once he is placed in the custody of the department and until his release, is provided with, among other things, educational opportunities, necessary medical care, legal assistance, job training and even a paying job; after release he is assisted in finding gainful employment. Victims of crime, as a direct consequence of the crime, often need similar assistance as well as counseling services, compensation for the injury suffered, assistance in claiming personal property used in evidence, information about the criminal trial process and their role in it and, perhaps most importantly, the encouragement to participate in that process.[130] Provisions of Article 5 of the Model Sentencing and Corrections Act were drafted in the attempt to include victims in the sentencing process and provide some assistance to them.

Article 5 implements a statewide commitment to victims by fixing centralized responsibility for victims' programs in the department of corrections while at the same time providing authority for regional implementation. A statewide department of corrections, with the community programs and facilities mandated by the Model Act, is well suited to fulfill the victims' needs. It is already equipped to provide any of the services needed by victims because it is providing similar service to offenders.

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[128] Commission on Victim Witness Assistance, Nat'l Dist. Attorneys Ass'n, A Primer for Model Victim Witness Assistance Centers (Undated).

[129] *E.g.*, Commission on Victim Witness Assistance, Nat'l Dist. Attorneys Ass'n, Help for Victims and Witnesses (1976) [hereinafter cited as Help for Victims and Witnesses]; Marquette University Center for Criminal Justice and Social Policy, Victims and Witnesses (1976).

[130] *See* Jones, *A Cost Analysis of Federal Victim Compensation*, in Sample Surveys of the Victims of Crime 189, 196-200 (W. Skogan ed. 1976); Help for Victims and Witnesses, *supra* note 129.

It could be argued that the provisions of Article 5 and other sections of the Act designed to meet victim needs,[131] are not sufficiently inclusive. The limited nature of the provisions is evidenced by their primary thrust which requires the department to refer victims to services rather than to provide the services within the department.[132] Nonetheless the Committee decided not to expand the provisions, particularly in areas in which services would be provided directly by the department, and to avoid completely the area of crime victims' reparations. The reason behind the decision to avoid dealing comprehensively with victims' compensation and services was twofold.

First, it was felt that, although there are strong policy reasons in favor of including victims' services as part of the program responsibility of a department already providing similar services to offenders, the approach was novel and needed experimentation rather than immediate legislative mandate. This was believed to be particularly true in light of the fact that comprehensive services would require considerable additional state funding.

Second, many states have already enacted, or are in the process of enacting, victims' compensation statutes. Too extensive an intertwining of victims' compensation with the Model Sentencing and Corrections Act might complicate the enactment of the Model Act.[133] The services provided at present in the Model Act can, in other words, mesh comfortably with almost any existing state victims' compensation scheme.

The decision to exclude compensation to crime victims has, however, led to some unfortunate distinctions between what are properly victims' services for purposes of the Model Act and what are aspects of victims' compensation and thus to be excluded from this Act whether or not presently included within the Uniform Crime Victims Reparations Act. This decision, for example, has prevented a complete interlocking of the sentencing system, which permits victim input, and the duties of a Crime Victims Reparations Board. Thus, although it may have been advisable to charge the Board with an obligation to seek restitution from offenders and to provide information to the Sentencing Commission, there was no direct way to accomplish this without drafting additional provisions with respect to crime victims reparations.

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[131] *E.g.*, MSCA §§ 3-205 [Disclosure of Presentence Reports], 3-207 [Sentencing Hearing], and 3-602 [Modification or Waiver].

[132] *See* MSCA § 2-203(7).

[133] The Act does include, however (Section 5, Part 2), a place for states to insert the NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CRIME VICTIMS REPARATIONS ACT (1973).

In providing the limited provisions of Article 5 it was hoped that states would use these provisions as a base and expand their victims' services as they gained experience. The Special Committee was also hopeful that states might provide additional services to assist victims.[134] The present provisions, then, represent a foundation upon which to develop and expand victims' services.

IV. THE DRAFTING PROCESS

In 1974 the Law Enforcement Assistance Administration provided funds to the National Conference of Commissioners on Uniform State Laws for the drafting of a sentencing and corrections act.[135] Pursuant to Conference policy two committees of commissioners were appointed to work on the Act. The Special Committee to Draft the Act[136] had primary drafting responsibility; a review committee was appointed to follow and comment on the work of the Special Committee.[137] The Special Committee met a total of seventeen times from its first meeting, November 28 to 30, 1975, to its final meeting, March 31 to April 2, 1978. In 1976 and again in 1977 it presented a tentative draft of the Act to the Conference at its annual meeting.[138] In August of 1978, after two prior readings, the

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[134] *See, e.g.*, CAL. PENAL CODE § 1413(b) (West Supp. 1979) (authority to photograph evidence in lieu of retention of evidence).

[135] *See* text accompanying note 2 *supra*.

[136] Wallace Rudolph, Dean of the University of Puget Sound Law College, was chairman of the Special Committee from the inception of the drafting project until September 1977 and subsequently served as a special consultant to the Special Committee. The Honorable Charles Joiner, Federal District Judge, Detroit, Michigan, served as chairman from September 1977 until completion of the drafting project. For a full list of commissioners who were members of the Special Committee, and the dates of their participation, see MSCA at ii.

[137] The Honorable Richard L. Jones, Chief Justice, Alabama Supreme Court, served as chairman of the Review Committee throughout the drafting project. Members of the Review Committee were present at most of the drafting meetings of the Special Committee. For a full list of commissioners who were members of the Review Committee, and the dates of their participation, see MSCA at ii.

[138] At the times of presentation of both the first and second tentative drafts the Act was referred to as the Uniform Corrections Act. The title was expanded to Sentencing and Corrections Act in order to more accurately reflect the scope of the Act. Upon final reading and formal approval the Conference voted to make the Sentencing and Corrections Act a model rather than a uniform Act. Conference criteria for uniform acts require that:

> (1) There should be an obvious reason and demand for an act such that its preparation will be a practical step toward uniformity of state law or at least toward minimizing its diversity;
>
> (2) There should be a reasonable probability that the act when approved either will be accepted and enacted into law by a substantial

Conference formally adopted the Model Act.

The Special Committee to draft the Act was comprised of members with different philosophical positions as to the proper functioning of a sentencing and correctional system and widely varying experience backgrounds that included academic, judicial (trial and appellate levels) and practitioner, both within the field of criminal law and in the private practice of law. These diverse backgrounds and viewpoints were complemented by the viewpoints and experience of the individuals and groups[139] who acted as advisors to the Special Committee. The drafting process reflected the extensive discussion engendered by the impacting of the various experiences and views of the participants.

V. CONCLUSION

It is difficult to do justice to the complex and interrelated provisions of the Model Sentencing and Corrections Act in this brief and necessarily superficial overview. It may appear that the Act proposes radical and impractical suggestions since only the basic

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> number of jurisdictions or, if not, will promote uniformity indirectly; and
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> (3) The subject of the act should be such that lack of uniformity or diversity of state law will tend to mislead, prejudice, inconvenience, or otherwise adversely affect the citizens of the states in their activities or dealings in other states or with citizens of other states or in moving from state to state.

2 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS PROCEEDINGS IN COMMITTEE OF THE WHOLE TO DISCUSS THE UNIFORM SENTENCING AND CORRECTIONS ACT, at 473-74 (1978). Criteria for uniform acts also recommend avoiding denominating as uniform an act that is "entirely novel and with regard to which neither a legislative or administrative experience is available, controversial because of disparities in social, economic or political policies, and of purely local or state concern and without substantial interstate implications." *Id.* at 474. After a consideration of these criteria the Conference voted to adopt the Sentencing and Corrections Act as a model act.

[139] Advisors included the American Bar Association, the American Association of Wardens and Superintendents, the American Law-Psychology Society, the National Conferences of State Trial and Appellate Judges, the National Council on Crime and Delinquency, the National Legal Aid and Defender Association, the American Medical Association (Division of Medical Practices, Health Care in Correctional Associations), the AFL-CIO (Human Resources Division), the United States Parole Commission, and the Council of State Governments. The Committee also benefitted substantially from the participation of numerous correctional administrators and staff and from the formal participation of the American Correctional Association which had at least one representative present at all but the first six Committee meetings. The Committee met with correctional administrators from Texas, Indiana, Michigan, Idaho, Connecticut, Arizona and Illinois. Finally, the Federal Bureau of Prisons furnished significant assistance by providing a Bureau representative to attend the January 1977 and each subsequent Committee meeting. For a complete list of consultants and advisors, see MSCA at iii.

thrusts of the provisions are discussed and the careful qualifications and transition sections have often been omitted. To be sure, the Model Act is a forward-looking document; the Special Committee did not necessarily feel constrained by the existing law of prisoner's rights and often preferred to exercise the legislative perogative of moving farther and faster than the courts in improving the conditions of prison life.

Enactment of the Model Act in its entirety will make the sentencing and correctional process in some respects more expensive and more difficult to administer. In several instances, perhaps a majority, the provisions of the Act do not represent the consensus position of correctional practitioners or sentencing judges. Yet each provision was carefully considered and arguments for many points of view were forcefully made. In every instance, the Committee had evidence or testimony that the provisions of the Act could be practically implemented if the will and the means to do so were present.

The Model Act provides the states with an integrated legislative package for sentencing and correctional reform. For less ambitious jurisdictions the separate provisions of the Act provide model language and solutions for many complex problems facing the criminal justice system.

Redesigning the Criminal Justice System: A Commentary on Selected Potential Strategies

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IT IS UNLIKELY that any general evaluative statement about the criminal justice system, or nonsystem as some observers style it,[1] would bring such widespread agreement as the proposition that the system is not functioning as smoothly, harmoniously, and effectively as might be desired.

The criminal justice system may be described as a loosely articulated operating network of input-output relationships among entities processing criminal justice matters (principally persons and information). It is comprised of a variety of units, performing different functions, and operating at different levels of government, directed toward a common general objective (processing criminal justice matters). It is a system in that a number of processes are linked together in the common task of seeking to accomplish overall system goals. Because these units are functionally interrelated, a change in one event or in one part of the system produces a change of greater or lesser magnitude in other segments of the system. Consequently, any comprehensive analysis must look at the entire system as a unit rather than concentrating on changes or reforms in only a single unit or subsystem.

Numerous observers have pointed out that various components of the system actually work at cross purpose to each other, and that an absence of effective coordination among them has dysfunctional consequences. It is further pointed out that the methods used by various subsystem units in carrying out their particular tasks have contraindicated effects in terms of system goals. For example, if the result of processing through the criminal justice system is to maximize opportunity to reenter the community without again becoming a system input, those aspects of the experience which work against the potential for reentry with minimal discontinuity are effectively thwarting an avowed overall goal of the system. Many components of the system, such as the prison experience, are said to function in a manner which has effects totally opposite of those envisioned, i.e., prisons as progenitors of crime and recidivism rather than reducing the likelihood of future criminal conduct.

If there is any lesson to be learned from efforts at reform of the criminal justice system it is probably that of humility as to the ultimate effect of any

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[1] Ernest Van Den Haag, "Crime or Punishment?," *National Review*, XXXI (March 2, 1979), 286; President's Commission on Law Enforcement and Administration of Justice, *The Task Force Report: Science and Technology* (Washington, D.C.: Government Printing Office, 1967), p. 53.

Reproduced from Federal Probation, v. 46, Mar. 1982: 49–54.

system change. *Today's far-reaching and enlightened change, or so the history of corrections efforts demonstrates, may easily become the problematic potpourri against which tomorrow's enlightenment will be directed.* A second lesson which might be well taken is that of the limits of any particular reformative alteration of technique, method, or philosophy as being able to turn the corner for the system, and change all of the system's dysfunctional consequences into consequences that are harmoniously integrated with some singular overarching objective. Furthermore, the multifaceted nature and complexity of the system and the disparate variables which factor into the behavior which brings one into contact with processing mechanisms of the criminal justice system augurs against overly optimistic assumptions of alteration in a single aspect of the unit without corresponding modifications throughout the system, or against single track or monocausal remedies.[2]

This statement does not undertake any comprehensive reorganization of the criminal justice system; rather, the objective is to suggest and highlight some selected strategies which appear to be worthy of consideration in contemplating the task of system reorganization.

I. Criminal Law

The criminal law determines what behavior, by omission or commission, is regarded as a crime. It also specifies the punishment for such transgression. Violations of criminal statutes, in contrast to civil violations which are regarded as offenses against the individual and for which redress or remedy must be sought by a private or civil action, are regarded as crimes against the state, and are prosecuted under state auspices

Criminal law, in essence, is determined by what kind of people hold what values (which they feel may be effectuated through legal proscriptions) at what point in time. Criminal law, then, is relative to time and place. Since criminal behavior, by definition, is a violation of a legislatively enacted and formulated rule (or a judicially formulated rule supposedly within the framework of constitutional or statutory intent), it follows in rather straightforward fashion that *one of the most visible and apparent methods of reducing crime would be to reduce the scope of the behavior which is defined as criminal.*

Many observers have commented on the detrimental consequences of "criminal overreach." Most commentaries on overreach of the criminal law emphasize the inefficacy or inappropriateness of criminalizing various kinds of moral prohibitions and/or of processing persons who are thereby brought into the criminal justice ambit by traditional means. Examples include laws regarding consensual sex acts, crimes wthout victims, or substance ingestation laws (such as drugs or laetrile) on the one hand to use of the criminal process for handling items which are civil rather than criminal in nature (such as enforcement of support payments), on the other.

Morris and Hawkins, for instance, starting from the perspective that the prime function of the criminal law should be to protect the citizen's person and property, feel that use of the criminal law to coerce men toward virtue by regulating the private moral conduct of the citizenry is expensive, ineffective, and criminogenic.[3] Morris and Hawkins contend that the criminal law is an inefficient instrument for imposing the good life on others. When the criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits at the cost of neglecting its primary task. A more proper, modest, and realistic role of the criminal law, and revision accordingly, is requisite to clear the ground of action of criminal law and enable the police, courts, and correctional agencies to "deal only with those problems and those people for whom their services and their capacities are appropriate; not those who are merely being sacrificed to prejudice and taboos."[4]

Overreach of the criminal law is said to compound the crime problem in the following ways:

(1) The criminal law operates as a "crime tariff" which makes the supply of such goods as narcotics and gambling profitable for criminal organization and activity.

(2) Criminal prohibition and law enforcement produce a secondary criminogenic effect by fostering crime in order to pay the higher prices as well as by fostering development of profitable large-scale organized criminal activity.

> . . . the drug laws have a greater effect than Prohibition in encouraging crime. It was no accident that Prohibition was the age of the great gangsters, and a time of "primitive capital accumulation" for the big crime families. By the same token, it is no accident that, under the aegis of our drug laws, our cities have become the stalking-grounds for the users of drugs who must pay ridiculously exorbitant prices

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[2] An example would be a belief that stricter statutory penalties would solve the crime problem. Furthermore, if police efficiency in clearing crimes by arrest miraculously improved, if felons are returned to the streets by the courts or the corrections system, or if they are processed through the corrections systems with a likelihood of recidivism, the "crime problem" has not been solved. If political gesturing could effectively control crime, the crime problem would have been mitigated some time ago.

[3] Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: Univ. of Chicago Press, 1970), pp. 2-28. Cf.: Ed Clark, *A New Beginning* (East Hobart, N.J.: Caroline House, 1980), pp. 108-111.

[4] Morris and Hawkins, pp. 2, 8.

> to support their habits. The time is coming when we will have to choose between imposing our norms for intoxicants on a large portion of the population, and having cities we can live in.[5]

(3) Proscription of some forms of behavior, such as homosexuality, or drug addiction, encourages development of an extensive criminal subculture and/or endows forbidden and frequently pathological conditions with a romantic glamour of a rebellion against authority or of some sort of elitist enterprise.

(4) Diversion and overextension of resources to enforce statutes regulating private morality siphons resources away from concentrating on crime against persons and/or property and encourages serious crime by failing to deal with it adequately.

(5) Criminalization of "crimes" without victims invites bribery and corruption among enforcers and is conducive to employment of extra-legal and arbitrary methods of enforcement.

There is little doubt but that any plan to deal with crime in America must face the problem of utilization of the criminal law as symbolic expressions of moral fervor, ecclesiastical glory, and political virtue by invoking criminal sanctions in matters of personal morality and victimless crime. There is a tendency for the criminal law to grow incrementally and to assume an inchoate status as the product of historical accidents. Laws dealing with gambling, sexual behavior, drug laws, pornography laws, are among those frequently identified as appropriate for a judicious application of an effort at reassessment and restatement of the nature of legislatively desired priorities in regard to invoking of criminal sanctions.

Establishment of a legislative standing committee on law revision, charged with the task of continuing assessment of the suitability of the criminal law, would be a desirable step. Among the advantages would be the increased likelihood of awareness of need for consolidation, codification, and constant critical observation of the whole body of criminal law.[6] Removal of the deadwood from the criminal law jungle would appear to be a significant step in the long-range objective of reform and rationalization of the criminal law.

Not only would a reassessment of the immoral or antisocial conduct which possibly should be removed from the criminal law appear to be a desirable objective, but simultaneous reassessment of the whole body of criminal law would provide an opportunity for the legislature to address a number of corollary evils. The appropriateness of evaluating and, where applicable, statutorily circumscribing or making explicit legislative intent in the exercise of discretion throughout the criminal justice system—from police discretion to pretrial procedure, sentencing, and various postconviction dispositions—would provide opportunity to specifically assess an area which has been the subject of considerable concern in recent years.[7]

The need for careful legislative drafting is a paramount one. Legislatures do have the option of preventing some problematic discretionary situations from arising by careful drafting, i.e., by avoiding overlapping statutes which give rise to serious constitutional and policy issues through prohibition of the same conduct by dual statutes with differential penalties.[8] Furthermore, when attempting changes in criminal justice processing, legislatures would be well advised to formulate rules in accordance with legislative commands in order to prevent other units of the criminal justice system from formulating their own rules which may not fully express legislative intent.[9]

II. Detection and Apprehension

Suggestions for improving police functions abound, ranging from changes in organization structure to personnel.[10] There is a considerable array of modern technology which can be utilized by the policeman on the beat (such as mobile communications devices which can be carried by the officer as part of his standard equipment to information storage and retrieval systems which permit maximum strategic deployment of manpower). Strategies which promote police-community harmony and congruency of interests clearly merit encouragement, including such developments as storefront dropin programs to communicate with residents of specific neighborhoods, establishment of neighborhood watch and prevention programs under police department encouragement and sponsorship, school liason programs, utilization of trained unpaid auxilliary personnel (such as reserve officer programs), training for handling special situations (such as conflict management training to aid in control of domestic disturbances and training to prevent police provoked incidents generally), and, where appropriate, handling of certain categories of offenses through techniques which provide diversion from the criminal justice system.[11]

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[5] Clark, p. 105.

[6] Morris and Hawkins, p. 27.

[7] See Daniel B. Kennedy, *The Dysfunctional Alliance: Emotion and Reason in Justice Administration* (Cincinnati: Anderson Publishing Co., 1977), or Burton Atkins and Mark Pogrebin, *The Invisible Justice System: Discretion & the Law* (Cincinnati: Anderson Publishing Co., 1978).

[8] Marcia H. Tush, "Duplicative Statutes, Prosecutorial Discretion, and The Illinois Violence Statute," *Journal of Criminal Law and Criminology*, 71 (Fall 1980), 221-235.

[9] E. F. Bay, "Juvenile Justice Concepts in California: Changing Concepts," *American Journal of Criminal Law*, 7 (July 1979), 180. Bay calls attention to legislative efforts (in reaction to the failure of the "father model" of court efforts to deal with delinquents) to provide community protection from juvenile criminal recidivism by treating certain juvenile criminals with the solemnity applied to adults committing similar crimes having been circumvented by court adaptations which do not adequately express legislative intent.

[10] Frequently these are incorporated in the notion of police professionalism, a concept which is often employed with contradictory implications. See Stephen E. Brown, "Conceptualizing Police Professionalism," *Southern Journal of Criminal Justice*, V (Fall 1980), 6-17.

Most of the above techniques are in general use. Several less widely used strategies which could be more widely employed include the resident deputy program, career criminal programs, and special detection units. *Resident deputy programs*, which involve designation of officers living in or near their community of assignment to extend tours of duty in specified geographical areas, appear to produce favorable attitudes and perceptions in target communities.[12] The *career criminal programs* concept involves concentrating prosecutorial resources on repeat offenders with serious records with an intent to achieve increased convictions.[13]

Future research needs to be recognized as an important aspect of criminal justice planning. It has been observed that while there is a fund of knowledge on "how we can control, audit, and monitor people . . . we have only the most elementary knowledge of how to audit computers and those who have learned to use them . . .. Existing control methodology is not adequate for internal control, or for investigation by investigatory agencies, or regulation by regulatory agencies."[14] Certain types of crimes which require extended investigation and specialization are most feasibly handled by special units, sometimes housed within the prosecutor's or attorney general's office. Anticipation of the future trends and forms of crime should aid in preventing crisis reaction as opposed to proactive readiness, including specialized detection units where indicated. Increased concern with consumer protection, and the development of specific consumer fraud legislation and offices, are desirable components of protection of the public against fraud and theft. While people robbing banks might be handled through regular police channels, the issue of banks robbing people needs the development of detection and enforcement units devoted to consideration of white collar crime. It has been suggested that business cheating is nothing less than enormous, in comparison with which street crime may be "small potatoes."[15] Future research in criminal justice needs to be concerned with projecting change in order to appropriately adapt to change.[16]

III. Improving Efficiency of Courts

Improved detection and apprehension would be of little ultimate value without corresponding improvement in capacity and performance of courts. James has recommended several developments: streamlining of creaking court systems for a hodgepodge of independent courts with varying overlapping jurisdiction to a modern administrative system under supervision of the state supreme court; replacement of justice of the peace courts with courts with judicially trained presiding officers for criminal matters and establishment of small-claims courts and/or a system of arbitration for minor civil matters; establishment of an office of court administrator; use of modern word processing techniques and business procedures to minimize waste of time of jurors and witnesses; eliminate the old "term" system and hold court continuously as needed; diversion into other dispositionary proceedings where appropriate; restriction on the use of local courts as revenue gathering systems; and significant tightening of continuances.[17]

One of the more seminal analyses in recent years of the functioning of courts as legal entities has been provided by Macklin Fleming,[18] who feels that multiple trials of the same case, multiple review of the same issues, judicial procrastination, technical delay, sidetracking of inquiry into collateral issues, expansion of Federal power over state criminal procedure, and willingness to depart from legislative proscription have functioned to atrophy the ability of the judicial process to balance the scales of justice. Fleming stresses the need for appellate judges to acquire trial judge experience, congressional correction of lower Federal court duplication of state court functions, and replacement of absolute oligarchy with term oligarchy for Federal Supreme Court judges by limiting them to terms of 16 years.

IV. Prisons and Victims

A prison sentence is the most basic and fundamental of criminal law sanctions. For all the rhetoric of "treatment" and "correction," rehabilitation is largely an illusion. Nevertheless the notion of the propriety of imprisonment remains standard. Imprisonment neither protects society nor rehabilitates criminals, with consequences that the convict who does time is likely to become the object of another police hunt after he hits the streets. Colson has spoken in terms of "the steady gradual erosion of a man's soul, like radiation slowly burning away tissue,"[19] which can be a far greater punishment of nonviolent offenders than their crimes warrant. Furthermore, the prison experience itself often results in victimization by violent people within the institution[20] and promotes habits and attitudes which are considerably more detrimental to the convicts and society than they had before being placed in prison.

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[11] Robert Trojanowicz and S. L. Dixon, *Criminal Justice and the Community* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1974).

[12] V. Knapp, et al., "The Effects of a Resident Deputy Program on Attitudes and Perceived Law Enforcement Services," *Southern Journal of Criminal Justice*, V (Fall 1980), 48-61.

[13] Peter W. Greenwood, "Career Criminal Prosecution: Potential Objectives," *Journal of Criminal Law and Criminology*, 71 (Summer 1980).

[14] B. James McGregor, *White Collar Crimes: Defense and Prosecution* (New York: PLI, 1971), pp. 20-21.

[15] A. C. Germann, et al., *Introduction to Law Enforcement and Criminal Justice* (Springfield: C. J. Thomas, 1973), p. 267.

[16] Gene Stephens, "Why Study the Future of Criminal Justice?," *Southern Journal of Criminal Justice*, V (Fall 1980), 74-86. Cf.: H. Sepler, "The Next Twenty-Five Years Facing the Criminal Justice System," *American Journal of Criminal Law*, 7 (March 1979), 147-166.

[17] B. James, *Crisis in the Court* (New York: McKay, 1968).

[18] *The Price of Perfect Justice: The Adverse Consequences of Current Legal Doctrine on the American Courtroom* (New York: Basic Books, 1974).

Various diversionary models have been generated by the belief that control of crime and delinquency is improved by handling offenders outside the traditional imprisonment system where possible.[21] Alternative methods of dealing with status offenders,[22] and developments such as halfway houses, work release, and shift of emphasis to community programs, are illustrative steps which have been taken to promote reintegration into the community with maximum opportunity to avoid recidivism, and, at the same time, give expression to values which reflect humanitarian goals.

The criminal justice system is almost totally oriented toward the criminal. Procedural law is designed to protect rights of the accused. The criminal justice process, ostensibly, is designed to aid, treat, correct the criminal. In this sense, it is the needs of the criminal himself which is the focus of attention. Although it is impossible to separate the interests of the criminal and the interests of society in that society benefits from whatever system that minimizes the likelihood of future criminal acts, there is a deficiency injustice when criminals, who inflict pain and degradation upon individuals and families, are allowed to "pay their debt to society" without restitution to the individuals who have been injured.[23]

Mikva has called attention to the understandable chagrin of citizens who observe the guilty released for what appears to be trivial reasons unrelated to factual guilt (as failure of the police to say the right words when making an arrest) or when criminals are given probation and are returned to the street in assembly line justice which paroles persons to commit more crimes. Public frustration can lead to episodic draconian punishment. The malaise is compounded because "the malfunctioning prison system hardens prisoners and thus compounds rather than corrects the problems."[24] Mikva suggests that a suitable method for mediating between system insensitivity to victims and their families and the frequently counterproductive effects of prisonization would be provision of some sort of "restitution or compensation. . . to make the victim whole again. Compensation for loss of life may be impossible, but that impossibility should not absolve the transgressor from any responsibility whatsoever for the damage he has caused." Mikva feels that "instead of sending a criminal to jail and ignoring him and the victim, we should seriously consider. . . programs which will allow the offender to earn enough money to recompense the victim."[25]

Although several states have established some kind of victim compensation program, restitution is not frequently employed by American courts. Nevertheless, the point seems well taken that *criminal proceedings need to be applied in the interest of the individual victim as well as society as a whole.* While the logistical and structural problems do present difficulties, and restitution to victims is certainly not a total answer to the failures of the correctional system, or of the discrepancy between the treatment aims and inability to rehabilitate, restitution doubtless should receive greater correctional significance.[26]

V. Utilization of Research

Rational policy probably has been handicapped by lack of systematic reliable information about the workings of various components of the criminal justice system so that its basic patterns, component elements, differential outcomes, and real outcomes can be effectively chartered. Information for legislative guidance probably has been largely intuitive, haphazard, and improvisatory. Consequently, it is not surprising that the criminal justice system should largely develop in haphazard fashion, or that various buzz words which come in vogue, i.e., community-based innovative treatment, etc., can become semantic trivia for traditional programs in new buildings. Furthermore, a procedure which becomes established develops its own self-serving constituency irrespective of its effectiveness, and becomes a status-quo vested interest which is difficult to reliably measure and evaluate without objective evaluative data.

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[19] Charles Colson, *Born Again* (Washington: Chosen Books, 1976), p. 284.

[20] For example, fear, intimidation, extortion, abuse, and degradation appear to be a common infliction upon those who are not saved from fellow prisoners by their size and strength. Russel Kirk, "Criminal Character and Mercy," *Modern Age*, 24 (Fall, 1980), 336-344. Homosexual rape appears to be an event which only the tougher and more hardened are able to escape. Alex Thio, *Deviant Behavior* (Dallas: Houghton Mifflin, 1978), pp. 135-137. Federal District Court Judge Frank M. Johnson, responding to criticisms of a 1976 judicial holding that Alabama State prisons were unfit for human habitation, observed that elimination of physical and mental indignities such as gang rapes, with prison officials stating there was nothing they could do, would not be creating a hotel setting. Quoted in *U.S. News and World Report* (March 1, 1976), 6C, cited in Roger F. Campbell, *Justice Through Restitution* (Milford, Michigan: Mott Media, 1977), p. 17.

[21] R. M. Carter, "The Diversion of Offenders," in P. Cromwell and J. Schryver, *Jails and Justice* (Springfield: Charles C. Thomas, 1975), p. 58.

[22] Frank A. Orlando, "Status Offenses: The Court's Role," *Resolution (Of Conflicts in Correctional)*, 1 (Winter 1976), 24-27.

[23] George T. Felkenes, *The Criminal Justice System: Its Functions and Personnel* (Englewood Cliffs: Prentice-Hall, 1973).

[24] Abner J. M[illegible]va, "Victimless Justice," *Journal of Criminal Law and Criminology*, 71 (Fall 1980), [illegible].

[25] *Ibid.*

[26] J. Polish, "Rehabilitation of Victims," in J. Schultz and J. Thomas (eds.), *Criminal Justice Systems Review* (Buffalo, N.Y., 1974), pp. 276-320. Cf.: Michael R. McAdam, "Emerging Issue: An Analysis of Victim Compensation in America," *Urban Lawyer*, 7 (Spring 1976), 346-366. For discussion of the restitution rationale and illustrative programs, see Campbell, op. cit.

There is a need for more reliable planning and legislative policy input beyond a hodgepodge of unfounded assumptions, ignorance, fear, apathy, vested interest, and inertia. Research and evaluation must be recognized as fundamental elements of management at each level in the criminal justice system.[37] Systems analysis research which will provide critical data for decisionmaking, prediction research, evaluation research as to which correctional measures are most feasible for certain categories of offenders, crime analysis research to aid in the deployment and allocation of personnel, are illustrative areas in which research data is needed. Morris and Hawkins, commenting on the need for criminal justice system research, observe:

> . . . our ignorance seriously impedes effective social control. It may also impede acceptance of more humane and more effective treatment methods. The common assumption is that deterrence and reform represent some sort of natural antinomy. Whether they conflict in fact will be known only when we better understand our capacity to influence human behavior by threats and by retraining programs and when we understand the proper limits and roles of each. We are in the prehistory of such studies.[38]

Summary and Conclusions

It has been suggested that perhaps in no other area of human services has the contrast between aspiration and reality been so great as in the area of criminal justice. The criminal justice system is a loosely organized interrelationship of units which deal with criminal justice matters. It is suggested that a major step to desirable reform and alteration is a careful assessment of what the criminal law philosophically should and realistically can be expected to accomplish. Criminal law overreach, particularly into the area of private morality, would appear to have a number of dysfunctional consequences. Improving the efficiency of the courts, both in terms of administrative practice and the legal parameters of the judicial enterprise, are necessary to any comprehensive design for overall improvement of the criminal justice system.

It is further suggested that rediscovery of and practical implementation of the rights of and concern for victims provides a desirable philosophical base for development of approaches which strike a balance in mediating the important issues of justice, punishment, deterrence, and treatment. Victim restitution, while not a system cure-all, is probably more desirable than "paying a debt to society" through imprisonment. Reliable evaluative and planning data are requisite for effective management at all levels in the criminal justice system.

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[37] R. J. Waldron, et al., *The Criminal Justice System: An Introduction* (Boston: Houghton Mifflin, [illegible]), pp. [illegible] ff.

[38] *The Honest Politician's Guide to Crime Control*, p. [illegible].

INTERJURISDICTIONAL MERGER OF SENTENCES: THE NEED FOR AN INTERSTATE COMPACT

Jeffrey Taylor Lewis was arrested and convicted in Nebraska for passing bad checks. While serving a sentence in the Nebraska State Penitentiary, Lewis was sent to Colorado[1] where he entered a guilty plea to a charge of second degree forgery.[2] The Colorado District Court sentenced Lewis to an indeterminate sentence, not to exceed three and one-half years, and ordered that the sentence run concurrently with the sentence which he was then serving in Nebraska.[3]

On appeal, Colorado argued that the trial court had insufficient jurisdiction under state law to impose a term which would run concurrently with one previously imposed by another jurisdiction. Colorado, like many other states, had neither specific statutory nor judicially-created authority which addressed this issue. In *People v. Lewis*,[4] the Colorado Supreme Court upheld the lower court's sentence by relying upon a general statutory mandate which directs courts to construe broadly the Colorado Criminal Code's sentencing provisions.[5]

Since our federal system of government permits each jurisdiction to develop its own correctional system,[6] problems arise when a defendant violates the laws of more than one jurisdiction. *People*

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[1] Colorado obtained custody of Lewis through the interstate "Agreement on Detainers." Colo. Rev. Stat. § 24-60-501 (1973).

[2] People v. Lewis, 564 P.2d 111 (Colo. 1977).

[3] *Id.* at 112.

[4] *Id.*

[5] Colo. Rev. Stat. § 18-1-102 (1973). Although the court stated that there were no statutes applicable to the situation presented, the Colorado Criminal Code and the Colorado Code of Criminal Procedure provide that felonies committed in the state are punishable by imprisonment at the state penitentiary. *Id.* §§ 16-11-301(1), 18-1-105(1) (1973). Nevertheless, the court "adopted" Section 3.5 of the American Bar Association Standards Relating to Sentencing Alternatives and Procedures, ABA, Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures § 3.5 (App. Draft 1968) [hereinafter cited as ABA Sentencing Standards], which authorizes sentences of imprisonment to run concurrently with the undischarged term of out-of-state sentences even though the time will be served at an out-of-state correctional facility.

[6] Under the United States Constitution, each jurisdiction has the implicit power to prescribe and administer penalties for violation of its own laws. *See* United States v. Constantine, 296 U.S. 287 (1935). The federal powers enumerated in the Constitution do not refer to a penal system. But the fifth, sixth and seventh amendments, which prescribe certain requirements for criminal cases in federal courts, imply the necessity of a federal correctional system. The states have authority to maintain penal facilities through their reserved police powers. *See also* Wendell, *Multijurisdictional Aspects of Corrections*, 45 Neb. L. Rev. 520-21 (1966).

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v. Lewis illustrates the difficulty which courts currently encounter in sentencing offenders in such circumstances. In many of these cases, there will be at least two prosecutors and two courts involved in determining the punishment for the multijurisdictional offender.[7] Therefore, conflicts will inevitably occur in attempting to determine where the multijurisdictional criminal will serve his sentences and what the terms of these sentences will be. To date, no satisfactory manner of resolving these problems has been developed.

This Comment will survey the current state of the law regarding sentencing of multijurisdictional criminals. In addition, the conflicting policies underlying consecutive sentencing and merger of sentences[8] for these offenders will be explored. Finally, the need for interstate and federal-state cooperation in this area will be assessed, and a model interstate agreement incorporating the concept of sentence merger will be proposed.

Current Practice

If crimes are committed within one jurisdiction, sentencing courts traditionally have had the option of imposing either consecutive[9] or concurrent[10] sentences.[11] Only the state of Missouri forbids concurrent sentencing for crimes committed wholly within that state.[12] Although a handful of other jurisdictions have imposed a presumption in favor of consecutive sentencing for intrastate crimes,[13] most jurisdictions have expressed a preference for concurrent sentencing, except in those cases where the criminal poses an unusual risk to the safety of the public.[14]

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[7] Wendell, *supra* note 6, at 520. There are no accurate figures on the number of criminals who owe prison time to more than one jurisdiction. In one study, however, as many as thirty percent of the prisoners in federal penitentiaries had charges pending against them or sentences waiting to be served in other jurisdictions. Bennett, *The Last Full Ounce*, Fed. Prob., 20-21 (June 1959).

[8] The phrase sentence merger comes from Section 14 of the Model Sentencing Act. National Council on Crime and Delinquency, Model Sentencing Act, art. IV, (2d ed.), 18 Crime and Delinquency 335, 367 (1972) [hereinafter cited as Model Sentencing Act]. It refers to the fusion or absorption of one criminal sentence into another and is commonly known as concurrent or consolidated sentencing. Perhaps it would be more realistic to speak in terms of replacement rather than merger of interjurisdictional sentences because generally the "merged" interjurisdictional sentence will be served according to the terms of the state in which it is served. See notes 65-68 and accompanying text *infra*.

[9] Under consecutive or cumulative sentencing the offender does not begin to serve one sentence until the previous one has expired. Carter v. McClaughry, 183 U.S. 365, 394 (1902).

[10] Concurrent sentencing means that the offender is given the privilege of serving a portion of each sentence on each day so that he serves more than one sentence at the same time. Nishimoto v. Nagle, 44 F.2d 304, 305 (9th Cir. 1930). See note 8 *supra*, where a similar definition is given for the related concept of sentence merger.

[11] *See generally* S. Rubin, Law of Criminal Corrections ch. 11, § 21 (2d ed. 1973). *See also* ABA Sentencing Standards, *supra* note 5, at § 3.4 and explanatory commentary.

[12] Mo. Rev. Stat. § 546.480 (1953).

[13] *See, e.g.*, Ala. Code tit. 45, § 32 (1961); Miss. Code Ann. § 99-19-21 (1972); Va. Code Ann. § 19.2-294 (1950).

Presently the jurisdictions follow a number of different rules in determining whether the multijurisdictional criminal can serve a consolidated term for his offenses. The variety of practices suggests that the law in this area is in a state of confusion. This is borne out by the fact that different courts within a single jurisdiction have reached conflicting results.[15]

A short survey of the federal and state practices illustrates the diversity of approaches in this area. The United States Attorney General has statutory authority to determine whether criminals will serve their federal sentences concurrently or consecutively with sentences from state courts.[16] On the state level, nearly half of the jurisdictions do not appear to have either statutory or case law addressing the issue.[17] A few state legislatures have recently enacted statutes which specifically authorize courts to sentence criminal offenders to terms that will run concurrently with sentences imposed by other jurisdictions.[18] Even in the absence of such specific legislation,

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[14] *See* ABA Sentencing Standards, *supra* note 5, at § 3.4 and explanatory commentary. *See also* S. Rubin, *supra* note 11, at ch. 11, § 21, where the author indicates that the law favors concurrent rather than consecutive terms because of the general legal philosophy favoring liberty.

[15] An example is New York law prior to 1975. In 1967 the legislature authorized New York courts to sentence defendants to concurrent sentences. N.Y. Penal Law §§ 70.25(1), 70.30(1) (McKinney Supp. 1977) and explanatory commentary. Some state courts interpreted the law as allowing the merger of state sentences with those previously imposed in other jurisdictions, and the Department of Correctional Services honored such dispositions. *E.g.*, People v. Vitale, 80 Misc. 2d 36, 360 N.Y.S.2d 375 (Nassau County Ct. 1974). In 1974, with a turnover in executive personnel, the Department abruptly changed its policy and asserted that a state sentence could not be served concurrently with a previously imposed sentence at an out-of-state penal facility. This view was adopted by some courts. *E.g.*, People v. Schatz, 45 App. Div. 2d 853, 858 N.Y.S.2d 506 (1974); People v. Schiraldi, 80 Misc. 2d 103, 362 N.Y.S.2d 378 (Sup. Ct. 1974). Other New York Courts, however, continued to sentence offenders to concurrent terms to be served in out-of-state institutions. *E.g.*, People v. Vitale, 80 Misc. 2d 36, 30 N.Y.S.2d 375 (Nassau County Ct. 1974). The conflict was resolved in 1975 when the legislature overruled the Department of Correctional Services by passing legislation which specifically authorizes sentences to be served concurrently with those previously imposed by other jurisdictions. N.Y. Penal Law §§ 70.20(3), 70.25(4), 70.30(2-a) (McKinney Supp. 1977), and explanatory commentary.

[16] Federal courts routinely sentence defendants to terms which run concurrently with state sentences. *See* Hash v. Henderson, 262 F. Supp. 1016 (E.D. Ark.), *aff'd*, 385 F.2d 475 (8th Cir. 1967). Under 18 U.S.C. § 4082 (1970), however, the Attorney General has the right to designate where all federal criminal sentences will be served. Therefore, unless the Attorney General specifies that the institution where the defendant is serving his state sentence shall also be the place of federal confinement, the federal court's concurrent sentence is irrelevant. Although the district judge's decree is not binding, it is generally followed by the Attorney General. *See* United States v. Huss, 520 F.2d 598, 602 (2d Cir. 1975); United States v. Meyers, 451 F.2d 402, 404 (9th Cir. 1972); United States v. Herb, 436 F.2d 566, 567 (6th Cir. 1971); Joslin v. Moseley, 420 F.2d 1204, 1205 (10th Cir. 1969); Hamilton v. Salter, 361 F.2d 579, 581 (4th Cir. 1966). *See also* 18 U.S.C. § 3568 (1970); Chaney v. Ciccone, 427 F.2d 363 (8th Cir. 1970). The National Commission on Reform of Federal Criminal Laws has recommended that federal law be changed to require that all federal sentences run concurrently with state sentences unless the federal district judge feels that consecutive sentences are more appropriate. National Com-

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mission on Reform of Federal Criminal Laws, Final Draft, New Federal Criminal Code § 3206(6) (1971); National Commission on Reform of Federal Criminal Laws, Working Papers 1326 (1970). Legislation is currently pending before the United States Congress which would revise and reform the Federal Criminal Code. The Senate has passed a bill which prohibits federal courts from sentencing offenders to terms to run concurrently with state sentences. S. 1437, 95th Cong., 1st Sess. § 2304 (1977). However, the House version of that bill would allow federal judges to sentence offenders to terms concurrent with state sentences. H.R. 2311, 95th Cong., 1st Sess. § 2304 (1977).

[17] The following jurisdictions appear to have no statutory law or reported decisions on the subject: Delaware, Hawaii, Idaho, Maine, Maryland, Massachusetts, Mississippi, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. In addition, the courts of four states have specifically reserved the question of whether a trial court may combine a defendant's sentence with one from another jurisdiction, but hold that there will not be a presumption that interjurisdictional merger was intended to apply when the trial court is silent as to the effect of an out-of-state sentence. Herman v. Brewer, 193 N.W.2d 540, 545 (Iowa 1972); Beasely v. Wingo, 432 S.W.2d 413, 414 (Ky. 1968); State v. Peterson, 235 N.W.2d 801, 802 (Minn. 1975); Nelson v. Wolff, 190 Neb. 141, 206 N.W.2d 563, 564 (1973).

[18] Ark. Stat. Ann. §§ 41-903, 43-2312 (1977); Ill. Ann. Stat. ch. 38, §§ 1005-8-1(f), 1005-8-4(a), 1005-8-6(e) (Smith-Hurd 1973); Kan. Stat. § 21-4608(5) (1974); La. Code Crim. Pro. Ann. tit. 30, art. 883.1 (West Supp. 1976); Nev. Rev. Stat. § 176.045 (1977); N.Y. Penal Law §§ 70.20(3), 70.25(4), 70.30(2-a) (McKinney 1975); N.C. Gen. Stat. § 148-65.3 (Supp. 1975); 18 Pa. Cons. Stat. Ann. § 1361(b) (Pardon Supp. 1977-78); Va. Code § 19.2-308.1 (Supp. 1977). Utah does not expressly permit sentences to run concurrently with those in other jurisdictions. The length of any out-of-state sentences, however, must be added to that of the Utah sentence in calculating maximum allowable sentence length. Utah Code Ann. § 76-3-401(5)(c) (Supp. 1977). The Nevada statute serves as a good example of the type of legislative action which has been taken:

> 1. Whenever a person convicted of a public offense in this state is under sentence of imprisonment pronounced by another jurisdiction, federal or state, whether or not the prior sentence is for the same offense, the court in imposing any sentence for the offense committed in this state may, in its discretion, provide that such sentence shall run either concurrently or consecutively with the prior sentence.
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> 2. If the court provides that the sentence shall run concurrently, and the defendant is released by the other jurisdiction prior to the expiration of the sentence imposed in this state, the defendant shall be returned to the State of Nevada to serve out the balance of such sentence, unless the defendant is eligible for parole under the provisions of chapter 213 of NRS, and the board of parole commissioners directs that he shall be released on parole as provided in that chapter.
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> 3. If the court makes an order pursuant to this section, the clerk of the court shall provide the director of the department of prisons with a certified copy of judgment and notification of the place of out-of-state confinement.
>
> 4. If the court makes no order pursuant to this section, the sentence imposed in this state shall not begin until the expiration of all prior sentences imposed by other jurisdictions.

Nev. Rev. Stat. § 176.045 (1977)

several state courts have attempted to fashion rules regarding sentence service for offenders who commit offenses in different states. Some of these courts have consolidated in-state sentences with terms imposed by sister-state or federal courts.[19] Others, however, have totally rejected the concept of concurrent sentencing for defendants who have been convicted for offenses in other jurisdictions.[20]

POLICIES ADVANCED

In evaluating the appropriateness of concurrent or consecutive sentencing for multijurisdictional offenders, it is helpful to look at both the legal philosophies and the policies behind each of these practices. Criminal sanctions are aimed at achieving several different and often conflicting social policies.[21] Over the years, courts and legislatures have chosen to emphasize either retribution, deterrence, or rehabilitation as the primary purpose of criminal corrections.[22] While it is beyond the scope of this Comment to advocate a particular philosophy of punishment,[23] whichever theory is considered most persuasive will affect a jurisdiction's decision regarding sentence service for multijurisdictional offenders.

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[19] State v. Rhodes, 104 Ariz. 451, 454 P.2d 993 (1969); *In re* Patterson, 64 Cal.2d 357, 411 P.2d 897, 49 Cal. Rptr. 801 (1966); *In re* Stoliker, 49 Cal.2d 75, 315 P.2d 12 (1957). *But see* People v. Sewell, 139 Cal. Rptr. 389 (Cal. App. 1977) (life sentences must be served consecutively to previously imposed sentences from other jurisdictions); People v. Lewis, 564 P.2d 111 (Colo. 1977); Holland v. State, 352 N.E.2d 752 (Ind. 1976); *In re* Carey, 372 Mich. 378, 126 N.W.2d 727 (1964); People v. Daniels, 69 Mich. App. 345, 244 N.W.2d 472 (1976); State v. Corbit, 147 N.J. Super. 195, 370 A.2d 916 (1977); State v. Graham, 544 S.W.2d 921 (Tenn. Crim. App. 1976); *Ex parte* Lawson, 98 Tex. Crim. 544, 266 S.W. 1101 (1942); *Ex parte* Spears, 154 Tex. Crim. 112, 235 S.W.2d 917 (1951).

[20] Marrone v. State, 458 P.2d 736 (Alaska 1969); Wilson v. Warden, 26 Conn. Supp. 4, 209 A.2d 68 (Super. Ct. 1964); Grimes v. Greer, 223 Ga. 628, 157 S.E.2d 260 (1967); Huddleston v. Ricketts, 233 Ga. 112, 210 S.E.2d 319 (1974); State v. Braeger, 497 S.W.2d 181 (Mo. 1973); State v. Toliver, 544 S.W.2d 565 (Mo. 1976); *Ex parte* White, 50 Okla. Crim. 163, 296 P. 756 (1931), Clanton v. State, 446 P.2d 618 (Okla. Crim. App. 1968); State v. Stewart, 6 Or. App. 264, 487 P.2d 899 (1971). Alabama may also follow this rule. *See* Dunn v. State, 346 S.2d 51 (Ala. Crim. App. 1977). The Attorney General of Florida advises that Florida follows this rule. 73 OP. ATT'Y GEN. FLA. 433 (1973).

[21] For example, the Model Penal Code provides that the major purposes of its sentencing and treatment provisions are (1) to prevent the commission of offenses; (2) to promote the correction and rehabilitation of offenders; (3) to safeguard offenders against excessive, disproportionate, or arbitrary punishment; (4) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense; (5) to differentiate among offenders with a view to a just individualization in their treatment; (6) to define, coordinate and harmonize the powers, duties, and functions of the courts and of administrative officers and agencies responsible for dealing with offenders; (7) and to advance the use of generally accepted scientific methods and knowledge in sentencing and treating offenders. MODEL PENAL CODE § 1 (Tent. Draft No. 5, 1956). See CONTEMPORARY PUNISHMENT: VIEW, EXPLANATION AND JUSTIFICATIONS (R. Gerber and P. McAnany ed. 1972); THEORIES OF PUNISHMENT (S. Grupp ed. 1971).

[22] S. RUBIN, *supra* note 11, at ch. 10, § 6, and cases cited therein.

[23] Many authorities feel that the historical trend has been toward viewing the purpose of incarceration as rehabilitation. K. MENNINGER, THE CRIME OF PUNISHMENT (1968); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971). This

Those courts which have been reluctant to merge criminal sentences for multijurisdictional offenders have not, in most cases, articulated philosophical justifications to support consecutive sentencing. Often, these courts simply state that the statutes in the jurisdiction do not allow criminals to serve in-state time in out-of-state prison facilities.[24] Nevertheless, some rationales in support of cumulative sentencing for multijurisdictional offenders have emerged. For example, some courts have suggested that there are constitutional limitations on a jurisdiction's ability to merge criminal sentences with those from other jurisdictions. These courts have reasoned that penal laws cannot have the extraterritorial effect which is necessary for sentence merger.[25] Although that justification may have had some foundation at one time, it is now generally recognized that constitutional constraints do not limit the extraterritorial effect of penal laws.[26]

Another reason offered for refusing to integrate prison sentences for crimes committed in different jurisdictions is that it will lead to a disparity in sentencing between multijurisdictional offenders and those who commit crimes within only one state.[27] This concern, in essence, questions the validity of the concept of concurrent sentencing. As noted earlier, however, most jurisdictions allow intrastate offenders

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rehabilitative theory of punishment, which requires that treatment be individualized to some degree for each offender, has been approved by the United States Supreme Court. In Williams v. New York, 337 U.S. 241, 247 (1949), the Court declared that "the belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." Today rehabilitation is the prevailing theory of corrections. S. RUBIN, *supra* note 11, at ch. 18, § 13. For criticism of the theory, *see* C. LEWIS, GOD IN THE DOCK (1970).

[24] *See* State v. Stewart, 6 Or. App. 264, 487 P.2d 899 (1971).

[25] Grimes v. Greer, 223 Ga. 628, 157 S.E.2d 260 (1967); Clanton v. State, 446 P.2d 618 (Okla. Crim. App. 1968).

[26] F. ZIMMERMAN & M. WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 41-42, 77-78 (1961). In Huntington v. Attrill, 146 U.S. 657 (1892), the Supreme Court said that states cannot enforce the penal laws of other states. However, several interstate compacts have circumvented this rule by having one state act as the agent of another. A state may employ agents outside of its physical territory in order to assist in the enforcement of its penal laws. *See* COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 35 (Rev. ed. 1966) [hereinafter cited as INTERSTATE CRIME CONTROL].

[27] In support of this view the Minnesota Supreme Court said:

> [I]f a person is convicted of robbery in Minnesota and sentenced to five years and is thereafter convicted of a crime in Federal Court and sentenced [to a concurrent term] for five years, he would be free in five years. However, a defendant who committed only one state or one Federal crime might receive a five-year sentence also. This disparity in punishment should not result merely because of the desirability of a multiple sentence being served at one time under one correctional system.

State v. Petersen, 305 Minn. 478, 485, 235 N.W.2d 801, 805 (1975). *See also* State v. Cunnady, 192 Neb. 404, 222 N.W.2d 110 (1974).

to serve concurrent terms.[28] A related concern is that such sentencing will allow a defendant to avoid serving time for the crime committed in the state which sentenced him to the concurrent term. Thus, correctional philosophies may be important in a jurisdiction's decision to require offenders to serve their sentences in the state where the crime was committed. A state generally may be reluctant to allow offenders who break its laws to serve their entire sentences in other jurisdictions subscribing to different penal philosophies. For example, a state may feel that the retributive effect of punishment would be diminished if the offender's in-state sentence were merged with one from another jurisdiction. Similarly, where rehabilitation is a prime consideration, a state might desire to control the corrections process itself in order to emphasize its own goals, rather than those of another jurisdiction. Or a state may feel that there is a greater deterrent effect when the sentence is served in the state where the crime was committed. Also if one state has determinate sentencing and the other has indeterminate sentencing, both states may be reluctant to permit merger of sentences. If such a conflict is too substantial, the jurisdictions may refrain from interjurisdictional sentence merger altogether. In many cases, however, correctional philosophies will not differ significantly.[29] Even where correctional goals do conflict, some jurisdictions may be willing to allow some displacement of their correctional goals to effectuate the goals of multijurisdictional sentence merger.

Those courts which support the merger of interjurisdictional sentences have advanced a variety of social, clinical, administrative and economic reasons for their preference. Many of these principles are similar to those which are advanced by advocates of concurrent sentencing in general.[30] One particularly persuasive argument which supports both intrastate concurrent sentencing and interjurisdictional merger of sentences is that the sentencing judge is afforded greater discretion in shaping the sentence to the defendant.[31]

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[28] See text accompanying note 14 *supra*. *See also* ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, SENTENCING COMPUTATION LAWS AND PRACTICE: A PRELIMINARY SURVEY, (1974) [hereinafter cited as ABA SENTENCING COMPUTATION SURVEY].

[29] In S. RUBIN, *supra* note 11, at ch. 18, §§ 5, 6 the author notes that most jurisdictions declare either deterrence, or reformation or both to be the purpose of their penal laws.

[30] *See generally* ABA SENTENCING STANDARDS, *supra* note 5, at § 3.4 and explanatory commentary for a discussion of those policies which are advanced for concurrent sentencing in general.

[31] For example, a former Governor of New York said:

> The authority to impose [an interjurisdictional] concurrent sentence may be necessary in a particular case . . . in order to afford a sentencing court the opportunity to make the fairest disposition possible in that case. Those most familiar with our criminal justice system—jurists and penologists alike—agree that the courts should have this added flexibility in sentencing.

Another reason which has been offered in support of interjurisdictional merger of sentences is that it may induce the offender to cooperate with law enforcement agencies. A defendant who owes time on a sentence in another jurisdiction might be inclined to plead guilty and to assist law enforcement officers in the apprehension and conviction of other offenders if there is the possibility that he can serve his in-state sentence together with the undischarged term of his out-of-state sentence.[32]

A unified corrections program for multijurisdictional offenders may be beneficial regardless of a jurisdiction's penal philosophy. The fragmented character of the punishment imposed upon those criminals who are forced to serve time in several jurisdictions has impaired the development of meaningful corrections programs.[33] In particular, the rehabilitation function of corrections may be inhibited if the termination of a sentence in one jurisdiction serves only as the beginning of another sentence in a different jurisdiction. For example, the skills which an inmate has learned can become atrophied through disuse if he is transferred to an institution in another jurisdiction where he does not have an opportunity to practice that craft.[34]

Supporters of sentence merger also point out that this practice eliminates many of the disabilities that multijurisdictional offenders must face because of detainers. Detainers are often filed against multijurisdictional offenders in order to assure that, upon release from one jurisdiction's prison, they will be available to serve the sentence in the filing jurisdiction. Offenders who have detainers filed against them are usually deprived of many privileges.[35] For example, they may be incarcerated in maximum security, deprived of trustee status,

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Memorandum from Governor Malcolm Wilson, June 15, 1974, No. 214, *quoted in* People v. Vitale, 80 Misc. 2d 36, 42, 360 N.Y.S.2d 375, 383 (Nassau County Ct. 1974).

[32] *See* N.Y. Penal Law § 70.20(3) (McKinney Supp. 1977) and explanatory commentary. This rationale for merger would be of greatest value to jurisdictions when they impose sentences on defendants who already are serving prison time elsewhere. The state which first sentenced the multijurisdictional offender could not avail itself of this practice unless it cooperated with other jurisdictions in which the defendant had committed crimes.

[33] For example, the Colorado Supreme Court has said:

> A persistent problem in the area of sentencing has been the fragmented character of the punishment imposed upon criminals who commit crimes in a number of states. Punishment, rehabilitation of the defendant, and protection of the public are desired goals in the sentencing process. The fact that sentencing must occur in multiple jurisdictions should not automatically blind a sentencing court to the penal program already in progress.

People v. Lewis, 564 P.2d 111, 112-13 (Colo. 1977).

[34] Bennett, *The Correctional Administrator Views Detainers*, Fed. Prob. 8 (July-Sept. 1948). *Accord*, *In re* Carey, 372 Mich. 378, 126 N.W.2d 727 (1964).

[35] *See* Note, *Detainers and the Correctional Process*, 1966 Wash. U. L. Q. 417.

denied admission into programs which require temporary presence outside of the penal facility, and deprived of parole.[36] These restraints on the prisoner are unnecessary when multijurisdictional sentences are served together.[37]

There are also economic and administrative reasons which support interjurisdictional sentence merger. First, the practice would simplify the task of those officials who must keep track of the time remaining to be served by the multijurisdictional offender. Where the prisoner owes time for several crimes from several jurisdictions, these computations can become quite complicated under consecutive sentencing.[38] This is because the time computation rules of the different states often vary to a large extent.[39] With merger, only one jurisdiction's computation rules would apply. Second, the merger of interstate sentences would help reduce the number of prisoners shuttling back and forth between different jurisdictions.[40] Such prisoner transfers increase the costs[41] and the administrative burdens of incarceration. Finally, multijurisdictional merger of sentences should result in a general reduction in the costs of corrections since the financial burden of incarceration could be shared by more than one jurisdiction.[42] For example, a unified corrections program for a multijurisdictional offender would alleviate the waste which occurs when both sentencing jurisdictions duplicate services such as job counseling.

In general, the same principles which support concurrent sentencing in one jurisdiction are applicable on the interjurisdictional level.

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[36] *Id.* *See also* S. Rubin, *supra* note 15, at ch. 11, § 21.

[37] States which allow interjurisdictional merger of criminal sentences may also be concerned about the security practices employed in out-of-jurisdiction prisons which are used to incarcerate multijurisdictional offenders. Because these states do not intend to reincarcerate the defendant at the end of his merged term, their concern with restricting his liberties is not likely to be particularly urgent. If a state were truly concerned about security measures in other jurisdictions, it probably would refrain from merging sentences with that state.

[38] Records indicating the location of the prisoner and when he is due to begin serving his sentence in that state must be maintained. In addition, adjustments may have to be made in the prisoner's time computations.

[39] *See* ABA Sentencing Computation Survey, *supra* note 28, at 3-39.

[40] In *Ex rel.* Smith v. Dowd, 234 Ind. 152, 124 N.E.2d 208 (1955), for example, a prisoner who was serving a term in a state prison was released to federal authorities to serve a federal term, and was then returned to state custody to complete his state sentence.

[41] Transportation, as well as other costs, must be paid for prisoners and accompanying guards.

[42] Interjurisdictional merger of sentences could conceivably raise incarceration costs for those jurisdictions which presently spend very little on intrastate corrections programs. In addition, some of the savings which would result from the increased efficiency of correctional systems due to sentence merger might be offset by increased administrative costs involved in allocating the costs of multijurisdictional sentence service. See Appendix, Article X, *infra*. Nevertheless, the overall cost of incarceration should go down due to reductions in duplicative programs and the shortening of prison terms.

The fact that the defendant has crossed a jurisdictional boundary is not necessarily relevant to the correctional problem he poses.[43] Although merger of sentences may not always be appropriate, the sentencing judge should have the opportunity to make that determination.[44]

PROBLEMS WITH THE CURRENT STATE OF THE LAW

At present, a number of obstacles complicate the process of sentence merger for multijurisdictional offenders. The absence of adequate procedures to accomplish merger, even when two jurisdictions desire it, adds to the problems in this area. In addition, the complexity involved in effectuating merger has tended to obscure its benefits.

The courts and legislatures in some jurisdictions have acted unilaterally in attempting to merge sentences for multijurisdictional offenders.[45] Ultimately such measures will fail because they cannot provide for the necessary interstate and federal-state cooperation. For example, under current practice, a sentencing judge's efforts at sentence merger may be thwarted because the state in which the merged sentence is to be served may refuse to accept custody of the defendant until he has completed his sentence in the other state.[46] In this situation, the offender has no standing to object to the loss of the benefit that the merged sentence would have given him.[47] Without an effective means of merging sentences from different jurisdictions, the judge sentencing a defendant who faces charges in other jurisdictions has a confusing task.[48]

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[43] *See* ABA SENTENCING STANDARDS, *supra* note 5, at § 3.5 and explanatory commentary.

The Council of State Governments has said that continued institutionalization embitters the offender and defeats the objectives of correctional systems. S. RUBIN, *supra* note 11, at ch. 11, § 21. *See also* NATIONAL ADVISORY COMMISSION ON CRIMINAL STANDARDS AND GOALS, *Corrections* § 5.6(4) and explanatory commentary [hereinafter cited as NACC CORRECTIONS].

[44] It may be said that the sentencing judge can give a lighter sentence if he knows that the offender will be incarcerated elsewhere. However, as one commentator has pointed out, the situation is not that simple:

> The judge sentencing a defendant facing other charges in other jurisdictions has a confusing task. He may be tempted to accept a plea to a lesser charge to lessen the impact of the conviction on the sentences still to come, although the result is at best speculative. He may hesitate to impose a long term for the crime for which he is sentencing if the offender is facing subsequent sentences. He may want to place the defendant on probation but may regard it as futile because the next judge may commit on another charge. In such a confused situation, he may decide simply to sentence as though no other charges existed, which unfortunately complicates rather than solves the problem.

S. RUBIN, *supra* note 11, at ch. 11, § 21.

[45] See notes 16-20 *supra*.

[46] For example, in *In re* Tomlin, 241 Cal. App. 2d 668, 50 Cal. Rptr. 805 (1966), the defendant was on parole from a Virginia prison when he was sentenced for a crime in California. As a result, his Virginia parole was revoked. The California authorities attempted to send the defendant to Virginia so that the sentences of the two states could be served simultaneously. Virginia refused to accept custody of the defendant, however, until his California term was completed. In response to the offender's habeas corpus suit, the California

Another problem with the current system is how to determine the parole status of an offender who is serving concurrent terms from more than one jurisdiction. The states have not agreed on the rule to be applied in determining eligibility for parole under such circumstances.[49] Therefore, at present it will often be difficult for the offender who is serving concurrent sentences from several jurisdictions to determine when he is eligible for actual release. Without a clear determination of his parole status, many of the benefits of serving a merged sentence become illusory.[50]

The present system also does not ensure that the multijurisdictional offender will serve his merged time in the appropriate jurisdic-

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Court of Appeals stated: "The law of this state requires only that Tomlin be made available, it does not and can not compel the commonwealth of Virginia to take him." *Id.* at 670, 50 Cal. Rptr. at 806. *Accord,* Marrone v. State, 458 P.2d 736 (Alaska 1969); People v. Mahood, 59 Ill.2d 106, 319 N.E.2d 486 (1974).

[47] The Tenth Circuit Court of Appeals emphasized this point:

> "[I]t is a matter of comity between two sovereigns to decide between themselves who shall have custody of a convicted prisoner . . . . [I]f the sovereign having prior jurisdiction waives its right to custody the prisoner does not have standing to object." Joslin v. Moseley, 420 F.2d 1204, 1206 (10th Cir. 1969). *Accord,* Chunn v. Clark, 451 F.2d 1005 (5th Cir. 1971); Jones v. Taylor, 327 F.2d 493 (10th Cir.), *cert. denied,* 377 U.S. 1002 (1964).

[48] See note 44 *supra.*

[49] Some states presently require that the prisoner be returned to the state whose sentence has not been completed. CAL. PENAL CODE § 2900 (West 1970); ILL. ANN. STAT. ch. 38, §§ 1005 8-1(f), 1005-8-6(e) (Smith-Hurd Supp. 1978); People v. Lewis, 564 P.2d 111 (Colo. 1977). Other states allow their parole authorities to decide if the offender should be brought back to the home state to complete that state's remaining sentence or if his foreign parole should be honored. NEV. REV. STAT. § 176.045 (1977); N.C. GEN. STAT. § 148-65.3 (1978); 18 PA. CONS. STAT. ANN. § 1361(b) (Purdon Supp. 1978). New York takes a unique approach to this problem. It requires that the prisoner be returned to New York only if the New York sentence is longer than the out-of-state sentence or if the defendant has not yet served the minimum time on his New York sentence; otherwise New York will abide by the parole decision of the jurisdiction in which the offender is incarcerated. People v. Thompson, 87 Misc. 2d 302, 384 N.Y.S.2d 974 (Sup. Ct. 1974).

[50] One of the purposes or aims of sentence merger is to create unified sentences rather than multiple terms. See text accompanying note 34 *supra.* Sending the prisoner to a second state to complete his term will only frustrate the aim of sentence merger. In addition, where the parole status of the multijurisdictional offender is unclear, the parole board cannot confidently develop a parole plan because it cannot assure that the defendant will not be taken into custody by the other jurisdiction on his release. S. RUBIN, *supra* note 11, at ch. 11, § 22.

tion.[51] Unless the laws are changed, a prisoner will serve his concurrent time in the state that first sentences him.[52] That state, however, should not necessarily bear this burden, because the order of sentencing does not relate to the appropriateness of the place of incarceration.

The retention of jurisdiction to modify a multijurisdictional offender's merged sentence or to review his writ of habeas corpus also poses problems under the current law. It has been held that a transfer of a prisoner to another state for the purpose of concurrent sentence service does not amount to a waiver of the court's jurisdiction to modify the sentence.[53] Nevertheless, there are no existing means of assuring the retention of jurisdiction besides voluntary cooperation. Another problem with the present law is that the multijurisdictional offender may not receive the benefit of those maximum sentence limitations for concurrent sentences which are presently available to intrajurisdictional offenders.[54] A final problem is that under existing law no mechanisms have been developed which would equitably distribute the costs of incarcerating a multijurisdictional offender serving concurrent sentences. In sum, the current state of the law poses a number of practical problems which inhibit the implementation of multijurisdictional sentence merger.

THE ADVANTAGES OF AN INTERSTATE COMPACT

Effective merger of sentences for multijurisdictional offenders will be impossible until a mechanism is provided which will ensure interjurisdictional cooperation and consistency among the states in the incarceration of these criminals. The interstate compact is such a mechanism.[55] Because the compact is both statutory and contractual in nature, it assures the interstate cooperation and consistency in the law which are necessary for merger.[56]

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[51] There are several ways to determine in which jurisdiction it would be most appropriate for the multijurisdictional offender to serve his merged sentence. See note 66 and accompanying text *infra*.

[52] Prisoners who are sent from one state to another for the purpose of trial, under either the *Agreement on Detainers* or the *Uniform Criminal Extradiction Act* must be returned to the sending state on completion of the prosecution. Therefore, under current practice, multijurisdictional concurrent terms can only be served in the jurisdiction which has first sentenced the defendant. *See* INTERSTATE CRIME CONTROL, *supra* note 26, at 91-118, 128-57.

[53] People v. Lewis, 564 P.2d 111 (Colo. 1977).

[54] *See, e.g.*, MINN. STAT. ANN. §§ 609.15(2), 609.155(1) (1964); N.Y. PENAL LAW § 70.30 (McKinney's 1975).

[55] Wendell, *supra* 6, at 539. *See also* ABA SENTENCING STANDARDS, *supra* note 5, at § 3.5; NACC CORRECTION, *supra* note 43, 166; V. Perry, *Effect of Detainers on Sentencing Policies*, 9 FED. PROB., 11-12 (July-Sept. 1945). A proposal for such an interstate agreement may be found in the Appendix to this Comment.

[56] Wendell, *supra* note 6, at 539.

Interstate agreements in the area of criminal corrections have existed and worked successfully for at least fifty years.[57] In 1934, the United States Congress recognized the utility of the compact as a means for interjurisdictional cooperation when it approved the formation of agreements among the states for the prevention of crime.[58] Since then the states have entered into several such agreements.[59] A similar agreement providing for unified correctional programs for multijurisdictional offenders is also feasible.[60]

An interstate compact for interjurisdictional sentence merger should include several key provisions to enhance its feasibility. First, sentencing judges in states which are parties to the compact should be required to take all unfinished out-of-jurisdiction prison terms into consideration when sentencing a multijurisdictional offender. The sentencing judge, however, should not always be required to merge the in-state commitment with one from another state.[61]

The interstate compact also should determine the effect of a sentencing court's silence with respect to merger of sentences previously imposed by other jurisdictions. The resolution of a court's silence is particularly important in those cases in which the jurisdictions disagree on whether a presumption should be for consecutive or for merged sentences.[62]

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[57] In 1926 the National Conference of Commissioners on Uniform State Laws proposed the *Uniform Criminal Extradition Act*. *See* INTERSTATE CRIME CONTROL, *supra* note 26, at 128-57.

[58] 4 U.S.C. § 112 (1970). The Compact Clause of the United States Constitution, U.S. CONST. art. I, § 10, cl. 3, requires that Congress approve all compacts between the states.

[59] For example, the *Agreement on Detainer*, INTERSTATE CRIME CONTROL, *supra* note 26, at 91-118, which has been enacted by forty-six states, gives prisoners the right to clear all detainers filed against them and to secure final judgments on any indictments, informations or complaints outstanding against them in other jurisdictions. Likewise, the *Interstate Compact for the Supervision of Parolees and Probationers*, INTERSTATE CRIME CONTROL, *supra* note 26, at 1-68, provides for the supervision of offenders on conditional releases from prison in states other than the one of incarceration.

[60] The possibility of an interstate compact to merge criminal sentences was suggested in 1945 by Judge Van Buren Perry of the Fifth Judicial Circuit of South Dakota:

> [I]t might be possible to work out some kind of a reciprocal statute whereby the courts of one state would be authorized to cooperate with the courts of a different state having a similar law, to the end that some sort of a composite sentence be worked out, calculated to reform the offender so that he might be given liberty under proper supervision without being required immediately to receive another course of treatment from a different penitentiary.

V. Perry, *Effect of Detainers on Sentencing Policies*, FED. PROB. 12 (July-Sept. 1945).

[61] See Appendix, Art. III § 2 *infra*. The sentencing judge should consider the same factors in exercising his discretion as he would under intrastate sentencing standards. The trial court could be reversed on appeal for abuse of discretion if it did not take out-of-state commitments into consideration in sentencing the multijurisdictional offender.

The compact should also ensure effectuation of sentence merger once it is ordered.[63] Thus, if a state has subscribed to the compact, it should not be able to contest a subsequent merger of its previously imposed sentence, even if it believed that the merger was inappropriate in that particular case.[64] Such a result would be implicit in a state's adoption of the interstate compact.

The interstate compact should also include a maximum limitation on interjurisdictional terms similar to those applicable to intrastate sentences. The most logical solution would be to apply the maximum limitation of the state where the sentence would be served.[65]

The interstate compact must also provide a means for determining where the multijurisdictional offender will serve his consolidated sentence. The most appropriate place for such incarceration would probably be in the state which had sentenced the defendant to the longer term.[66] This standard provides certainty in determining where the sentence will be served. In addition, the length of a sentence may roughly correspond to the importance which a state places on an individual's incarceration; it may be said that the state with the longer term has the superior claim and interest in the defendant. The state sentencing the defendant to the longer term will also owe the larger financial contribution. Finally, if the term were served in the

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62. If different presumptions were enacted by the different jurisdictions, the operation of the compact would not be affected. Although the proposed interstate compact creates a presumption for merged sentences, that presumption could be changed by individual states, to support cumulative sentences. See Appendix, Art. III § (d) *infra.*

63. See Appendix, art. V. This article of the proposed compact requires sentencing courts to modify sentences which are merged by sentencing courts of other jurisdictions in accordance with that merger.

64. Prior to sentencing, of course, prosecutors would be allowed to argue that a merged sentence is inappropriate.

A necessary implication of this merger is that the sentencing judge of the first state would have to comply with the merger determination of the sentencing judge of the second state. Although it may be somewhat arbitrary to give the second sentencing judge such discretion, the alternative of granting the first court the right to make the merger determination would virtually undo the effects of the compact.

65. See Appendix, art. III § (b) *infra.* There would be no violation of an offender's rights under this proposal since he would have been subject to such maximum limitation if he had served consecutive sentences.

66. There are other possible places where the multijurisdictional offender could serve his combined term. For example, the sentence may be served in the state which has the superior claim to incarcerate the offender. Another choice for incarceration may be the jurisdiction where the offender has committed the more serious offense. Using the state with the longest sentence is one way of effectuating these standards with some degree of certainty. Another potential solution is to allow combined terms to be served in the offender's home state. The proposed compact chooses the jurisdiction of incarceration based on sentence length. See Appendix, Art. III § (c) *infra.*

state imposing the longer term, it would be easier to establish rules for parole and "good time" because that state's rules could be adopted.[67] The interstate compact must also provide for rules regarding sentence merger when one jurisdiction has determinate sentencing and the other has indeterminate sentencing. Determining which state has imposed the longer term in such circumstances may pose a problem because the state with determinate sentencing will have imposed a fixed term, while the other state will have imposed only a minimum and a maximum sentence. This problem can be resolved by requiring the merged term to be served in the state with determinate sentencing unless the minimum term of the indeterminate sentence exceeds the determinate sentence.[68]

The interstate compact should also permit those courts whose sentences have been merged to retain jurisdiction to modify sentences and review petitions of habeas corpus.[69] Without such a provision, a merged sentence could be considered to be an unconstitutional deprivation of the prisoner's rights.[70]

The interstate agreement should also provide a means for allocating the costs of interjurisdictional merger.[71] States might be reluctant to allow the merger of sentences unless they could be assured that there would be an equitable distribution of the costs among all of the sentencing jurisdictions.[72]

While the interstate compact may alleviate many current problems, it may also create some difficulties. For example, the compact may force states with longer prison sentences to take more than their fair share of multijurisdictional offenders. With a provision for allocating the costs of incarceration in the interstate compact,[73] however, that burden is considerably lessened. In any case, the substantial benefits likely to accrue from interjurisdictional sentence merger more than compensate for these new problems.

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[67] Under the proposed compact, parole and good-time are left to the rules of the party state in which the sentence is being served because most merged sentences will be served in the state which imposed the longer term. However, there are exceptions for sentences which are invalidated and for merged indeterminate and determinate sentences. See Appendix, art. VII *infra.*

[68] See Appendix, art. III § (c) *infra.*

[69] See Appendix, art. VIII *infra.* It is also appropriate for the interstate compact to protect the prisoner's and state's rights generally. See Appendix, art. IX *infra.*

[70] Under the proposed compact, if the longer term were overturned, the defendant would be sent to the state which imposed the next longest sentence. See Appendix, art. VII *infra.*

[71] The proposed compact allocates costs on a pro rata basis. See Appendix, art. X *infra.*

[72] It is possible that any system of cost allocation could lead to problems because of the various correctional costs of the different states. However, no matter how high the incarceration costs of any one state are, it is unlikely that sentence merger would lead to higher costs than does consecutive sentencing because merger would allow the costs to be divided.

[73] See Appendix, art. X *infra.*

CONCLUSION

Under current practice the multijurisdictional offender may be punished, restrained and rehabilitated by several different correctional systems. The existing practice deprives the offender and society of the administrative and social benefits of a unified correctional program.

Unilateral state efforts at concurrent sentencing of multijurisdictional offenders will inevitably fail. Therefore, any future resolution of the problems raised by the interstate multiple offender will depend on the availability of an interstate agreement authorizing the interjurisdictional merger of sentences. The proposed compact which follows is an example of the type of interstate enactment which would eliminate the inadequacies of the present practice.

APPENDIX[74]

AN INTERSTATE COMPACT FOR THE MERGER OF MULTIPLE SENTENCES

The contracting states solemnly agree that: Pursuant to the consent of the Congress of the United States heretofore granted by section III, Title 4, United States Code, as required by section 10, Article I of the Constitution of the United States, the party states enter into the following agreement to be known as "An Interstate Compact for the Merger of Multiple Sentences."

ARTICLE I: *Purpose and Policy.*

The party states find that the failure to merge prison sentences for crimes committed in different states seriously inhibits a consistent and coherent treatment program for prisoners during confinement. To the extent that confinement is intended to rehabilitate the prisoner there should be considerable certainty concerning the course of treatment, its duration, and the circumstances under which it will be ended. Such treatment can only be achieved through unified sentences. The party states also find that the failure to merge prison sentences for crimes committed in different states imposes unnecessary financial and administrative burdens on each state. Accordingly, it is the policy of the party states and the purpose of this compact to encourage the merger of multiple sentences of imprisonment imposed by different states so that said sentences may be served at one time and under one correctional authority. The party states further find that proceedings with reference to such merger, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

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[74] Parts of this compact have been drawn from the ABA SENTENCING STANDARDS, *supra* note 5, at § 3.5, and MODEL SENTENCING ACT, *supra* note 8, at §§ 14, 15, 16.

ARTICLE II: *Definitions.*

As used in this agreement:

(a) "state" shall mean a state of the United States, the United States of America, a territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.
(b) "sentencing court" means any court having jurisdiction to pronounce sentence on a person found guilty of committing a criminal offense.

ARTICLE III: *Interjurisdictional Merger of Sentences.*

(a) In imposing sentences upon a person who is currently serving a sentence of confinement in any other party state, the sentencing court shall take such confinement into consideration.[75]
(b) The sentencing court shall not impose a sentence which, when added to the out-of-state sentence, would exceed any limitations which would be effective had all of the offenses occurred within the state of sentence service.[76]
(c) The sentencing court may, in its sound discretion, merge any sentence of confinement with any unexpired sentence of confinement previously imposed on the same person by a sentencing court of any other party state.[77] The shorter[78] sentence or the shorter remaining sentence shall be merged into the other sentence, and the confinement shall be served at a penal or correctional institution in the party state with the longer remaining time to be served.[79] However, an indeterminate sentence shall be merged into a determinate sentence where the determinate sentence is longer than the minimum of the indeterminate sentence, and the confinement shall be served at a penal or correctional institution in the party state which sentenced the person to the determinate term.

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[75] *See* ABA SENTENCING STANDARDS, *supra* note 5, at § 3.5.

[76] *Id.*

[77] Only the judge in the second state prosecuting the defendant could merge sentences. See note 64 *supra*.

[78] The term "shorter" as used here would apply to the minimum terms of two indeterminate sentences.

[79] *See* MODEL SENTENCING ACT, *supra* note 8, at § 14.

(d) Sentences will be merged with any sentences currently being served by the same person in any other party state, unless the sentencing court expressly imposes a sentence which is to commence on the completion of the other sentences.

ARTICLE IV: *Transmittal of Information of Merged Sentences.*

Any sentencing court which merges a sentence pursuant to Article III shall furnish the other sentencing courts whose unexpired sentences are merged and the penal or correctional institution in which the defendant is presently confined with authenticated copies of its decree which shall also cite the out-of-state sentences being merged.[80]

ARTICLE V: *Effect of Merger of Sentences.*

If an unexpired sentence is merged pursuant to Article III, the sentencing court which imposed the sentence shall modify said sentence in accordance with the effect of the merger.[81]

ARTICLE VI: *Commencement of Merged Sentence.*

Any person sentenced under this compact shall be promptly transported to a penal or correctional institution in the party state where he is to serve his merged sentence, so that he can immediately commence service of that sentence.

ARTICLE VII: *Parole and Good Time Under Merged Sentence.*

Parole status and good time credits for any person sentenced under this compact will be determined by the applicable rules of the parole authorities of the party state in which the merged sentence is served. However, if the conviction for which the longer remaining time is being served is invalidated prior to the expiration of the shorter sentence, the prisoner shall be sent to the state which imposed the shorter sentence so that the balance of his sentence can be served, or so that he may be paroled.

ARTICLE VIII: *Retention of Jurisdiction.*

Any sentencing court which imposes a sentence that is merged pursuant to this compact shall retain jurisdiction to modify that sentence and to review petitions for habeas corpus.

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[80] *See id.* § 15.
[81] *See id.* § 16.

ARTICLE IX: *Rights of Offenders and Party States.*

(a) Any person confined pursuant to this compact shall be treated in a reasonable and humane manner.

(b) All states party to this compact shall have reasonable access to any institution in which a person is confined pursuant to this compact.

ARTICLE X: *Responsibility for Costs.*

Any costs or other expenses incurred under this compact by the party state in which the merged sentence is being served shall be equally divided between the party states whose sentencs have been merged until such time as the shorter sentence would have expired. At that time the party state which has imposed the longer sentence will become responsible for all costs of incarceration. However, any two or more states party to this compact may enter into supplementary agreements determining a different allocation of costs as among themselves.

ARTICLE XI: *Compact Administrators.*

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms of this agreement and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE XII: *Enter Into Force and Withdrawal.*

This compact shall enter into full force and effect when two or more states have enacted the same into law. A state party to this compact may withdraw herefrom by executing a statute repealing the same. However, the withdrawal of any state shall not affect the status of any sentence already pronounced pursuant to this compact at the time such withdrawal takes effect.

ARTICLE XIII: *Construction and Severability.*

This agreement shall be liberally construed so as to effectuate its purpose. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is held to be unconstitutional, the validity of the remainder of this agreement and the applicability thereof shall not be thereby affected.[82]

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[82] All conflicts between jurisdictions regarding the compact would come under the original jurisdiction of the United States Supreme Court. U.S. CONST. art. III, § 2, cl. 2.

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REAL OFFENSE SENTENCING: THE MODEL SENTENCING AND CORRECTIONS ACT

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The Uniform Law Commissioners recently adopted a Model Sentencing and Corrections Act.[1] It provides for the creation of a sentencing commission that would promulgate guidelines for sentencing. In the ordinary case, the judge would be expected to impose the sentence indicated by the applicable guideline. Defendants would be entitled to appeal the sentence imposed. To forestall or frustrate prosecutorial manipulation of the guidelines by means of charge dismissals and plea bargains, the Model Act separates sanctions from the substantive criminal law by directing the probation officer, the judge, and any appellate court to base sentencing considerations not on the offense of conviction but on the defendant's "actual offense behavior." In this respect, and in several others, the Model Sentencing Act is a perplexing document. This article explores some of its major perplexities.

Sentencing reform in America is now five years old.[2] Denver[3]

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[1] NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (Approved Draft 1978), *located in* 10 UNIFORM LAWS ANN., (master ed., West 1974) (Supp. 1980) [hereinafter cited without cross reference as MODEL ACT]. This essay is primarily concerned with Article 3 on sentencing. References to the Model Act should be understood to refer only to Article 3.

For insiders' accounts of the Model Act in general, and Article 3 in particular, see Perlman & Potuto, *The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview*, 58 NEB. L. REV. 925 (1979) [hereinafter cited as Perlman & Potuto]; Perlman & Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 VA. L. REV. 1175 (1979) [hereinafter cited as Perlman & Stebbins].

[2] Several influential books appeared some years earlier but the first major formal changes date from 1976. The major books included AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); M. FRANKEL, CRIMINAL SENTENCES (1973); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); A. VON HIRSCH, DOING JUSTICE (1976).

[3] *See* L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN, and A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION (National Institute of Law Enforcement

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adopted the first descriptive sentencing guidelines, and Maine[4] adopted the first determinate sentencing law in 1976. Since then, upwards of twenty states have enacted major sentencing "reform" laws.[5] Several states and many local jurisdictions have developed sentencing guidelines.[6] In crude oversimplification, the new regimes can be characterized as "descriptive" or "prescriptive." The former, typified by the Denver prototype, are empirically-based sentencing guidelines. Their aim is to inform, and they have no legal force. They purport more or less to describe past sentencing patterns for various categories of offenders and are based on statistical efforts to explain variation in past sentences. Their premise is that judges will use the information to test tentative sentencing decisions, reconsidering and sometimes changing those that differ from the guidelines, except when special circumstances appear to justify an extraordinary sentence. Prescriptive sentencing standards, in contrast, do have legal force; deviation by the judge usually gives rise to a right of sentence appeal. Prescriptive sentencing schemes can encompass detailed statutory sentencing standards, loose statutory sentencing standards, or presumptively appropriate sentencing

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and Criminal Justice 1978) [hereinafter cited as Wilkins, Kress]. For an assessment of the development and evaluation of the impact of the Denver guidelines, *see* W. Rich, L. Sutton, T. Clear, and M. Saks, Sentencing Guidelines: Their Operation and Impact on the Courts (National Center for State Courts 1980).

[4] Me. Rev. Stat. Ann., tit. 17A, chs. 47-54 (1979 Pamphlet). For a description and analysis see Zarr, *Sentencing*, 28 Me. L. Rev. 117 (1976). A federally funded evaluation of the impact of the Maine law was completed in 1978. J. Kramer, F. Hussey, S. Lagoy, D. Katkin & C. McLaughlin, Assessing the Impact of Determinate Sentencing and Parole Abolition in Maine. The report has not been published but copies can be borrowed from National Criminal Justice Reference Service.

[5] The sentencing reform schemes include statutory "determinate" sentencing (*e.g.*, Illinois, Indiana, California, Maine, North Carolina), parole guidelines (*e.g.*, Florida, Oregon, New York, Minnesota, Washington), creation of a sentencing commission to develop sentencing guidelines (*e.g.*, Minnesota, Pennsylvania), and mandatory minimum sentences (*e.g.*, Massachusetts, Michigan). Besides the states mentioned, major sentencing legislation has been passed in Arizona, Colorado, New Jersey, and New Mexico and probably other places as well. Although keeping up-to-date on sentencing reform developments is a full-time occupation, an attempt is being made with a federally-funded project at American University Law Institute. *See*, Criminal Courts Technical Assistance Project, Overview of State and Local Sentencing Guidelines and Sentencing Research Activity (American University Law Institute, May, 1980) [hereinafter cited as Overview].

[6] Overview, note 5 *supra*, indicates that as of May 1980 the following states were developing sentencing guidelines or were about to start: Alaska, Connecticut, Florida, Georgia, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Washington, Wisconsin. Among the local jurisdictions are: Maricopa County (Phoenix), Arizona; Denver, Colorado; Cook County (Chicago), Illinois; Topeka, Kansas; Lucas County (Toledo), Ohio; Essex County (Newark), New Jersey; Philadelphia, Pennsylvania; Clayton County (Dayton), Ohio; Hamilton County (Cincinnati), Ohio; Cuyahoga County (Cleveland), Ohio. For detailed descriptions of the earliest guidelines systems, see Wilkins, Kress, *supra* note 3, *passim* (Denver); J. Kress, Prescription for Justice (1980) (Chicago, Newark, Phoenix).

guidelines promulgated by a sentencing commission. The Model Sentencing Act is of the last sort.

The pace of change has been dizzying. Some states have experienced two or three generations of major sentencing reform innovation within a few years.[7] Much of the debate over sentencing law changes has been polemical and irresponsible.[8] The responsible debates over proposed reforms have dealt mostly with major institutional and structural issues—whether parole boards are better situated or otherwise more appropriate than judges to determine the lengths of prison sentences; whether sentencing policy should be set by the legislature, by a sentencing commission, by a judicial body, or by individual judges—and have been largely suppositious. None of the major reforms has been in effect for very long and policy-makers can only speculate as to how they will work in practice.[9]

In retrospect many of the early sentencing reform schemes were poorly conceived.[10] While attempting to prevent unwarranted sentencing disparities, to lessen bias and arbitrariness in sentencing and paroling decisions and to establish published decision standards that would make officials accountable, many of the early schemes assumed a simplistic model of how the criminal process works.

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[7] Minnesota established parole guidelines only to abolish parole in favor of a presumptive sentencing guidelines system. 1978 Minn. Laws, ch. 723, *et seq.*; MINN. STAT., Ch. 244, *et seq.* (1978). Each of the early sentencing guidelines projects—in Denver, Chicago, Phoenix, Philadelphia, and Newark—took place in states that later implemented major state-wide sentencing law changes.

[8] *See, e.g.*, for accounts of legislative ferment in California, A. LIPSON & M. PETERSON, CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING: A REVIEW AND AGENDA FOR RESEARCH (Rand Corp. 1980). The Pennsylvania legislature recently rejected as too lenient the proposed guidelines for sentencing developed by the Pennsylvania Commission on Sentencing.

[9] Besides the early impact evaluations described in notes 3-4 *supra*, the major impact evaluations have concerned mandatory minimum sentencing laws. *See* JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE (1977); Beha, *"And Nobody Can Get You Out"—The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston*, 57 B.U.L. REV. 96 (Pt. I) and 289 (Pt. II) (1977); Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y REV. 393 (1979). Several ambitious federally-funded impact evaluations are nearing completion and should be published some time in 1982. A Stanford University group directed by Jonathan Casper is studying the California experience, as is another group directed by Sheldon Messinger at the University of California, Berkeley, and Richard F. Sparks and Andrew von Hirsch of Rutgers University. The Berkeley-Rutgers group is also addressing the impact of sentencing law changes in other states, including Oregon and Indiana.

[10] Maine, for example, abolished parole without establishing sentencing criteria for judges. The result was to increase disparity in sentencing. California abolished parole and provided detailed statutory sentencing standards; the result has been to increase the sentencing power of the prosecutor greatly. Illinois established day-for-day "good time" (time off for good behavior) as a device for making sentences seem longer than they really are. Thus a nominal four year sentence is, given good behavior in prison, really a two year sentence. However, Illinois good time does not vest and prisoners are vulnerable to having their prison sentences greatly increased as a result of a guard's decision to penalize alleged misconduct by withdrawal of accrued good time.

California's Uniform Determinate Sentencing Act,[11] for example, was one of the earliest prescriptive sentencing laws and remains one of the most complex. The Act establishes a detailed sentencing tariff[12] that specifies normal, mitigated, and aggravated prison sentences for defendants convicted of particular felonies and prescribes the exact amounts by which sentences are to be increased on account of prior criminal record, use of a dangerous weapon, infliction of grievous bodily injury, and similar offense and offender circumstances.[13] Two of the systemic assumptions behind this detail are that judges decide sentences and that judges will conscientiously apply the sentencing tariff.

Neither assumption is wholly unwarranted. But neither of them is wholly warranted either. The difficulty is not that judges wantonly and whimsically disregard the will of the legislature but that judges do not work in isolation and most cannot imperiously disregard the interests and needs of other participants in the process.[14] The ubiquitous practice of offering defendants inducements to plead guilty satisfies the diverse needs of defendants, proscutors, defense counsel, and judges. If the court's work is to be accomplished, prosecutors, defense counsel, and judges must get along, and often that means going along. Conventions must generally be observed, important interests must be acknowledged, and expectations must be satisfied, otherwise the necessary patterns of cooperation break down. Sentencing decisions embody not only the judge's views, needs, and interests, but also those of the prosecutor, the defense counsel, and the defendant.

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[11] 1976 Cal. Stats. ch. 1139 (as amended).

[12] "Tariff" here and elsewhere refers to the implicit sentencing standards governing a court's sentencing decisions. See D.A. THOMAS, PRINCIPLES OF SENTENCING (2d ed. 1979) for a book-length discussion of the English sentencing tariff.

[13] For every offense, the Act specifies three prison terms (for example, 2, 3, or 5 years for robbery, CAL. PENAL CODE § 213 (1970 & Supp. 1981) (West)). The middle number is the presumptive *base* sentence although the judge may, in accordance with criteria established by the California Judicial Council, impose the higher or lower terms to reflect aggravating or mitigating circumstances. *Id.* § 1170 (Supp. 1981). The Act also provides that the judge "shall" add additional years of imprisonment to the base sentence if the defendant has previously served prison terms [if the present offense is a designated violent felony, three additional years imprisonment for *each* prior prison term arising from a designated violent felony conviction; for any felony for which a prison sentence is imposed, one additional year for each prior prison term]; or if the defendant was armed with a firearm, or personally used a deadly or dangerous weapon, or took, damaged, or destroyed property in value exceeding $25,000 [one additional year in each case] or personally used a firearm or took, damaged, or destroyed property in value exceeding $100,000 [2 additional years in each case] or, with intent to do so, inflicted great bodily injury [3 additional years]. *Id.* §§ 667.5, 12022, 12022.5, 12022.6, 12022.7. Critically, the enhancements may not be imposed unless they are "charged and admitted or found true." *Id.* § 667.5(d); *see also* § 1170.1(e). What all of this means is that the judge in most robbery cases can vary the sentence down by one year or up by two while the prosecutor in all cases can fine tune the prison sentence by electing which charges to file or dismiss and also by deciding what enhancements and prior prison sentences to charge and prove.

[14] The prevailing view among social scientists has been, for at least a decade, that the criminal court is a complex organization which can best be understood in terms of bureaucratic and organizational behaviors. The court is both an organization with goals, conventions, and norms, and an aggregation of individuals who are members of bureaucracies (the policeman, the prosecutor, the judge, the public defender). Patterns of interaction in any court depend on the quality of relations among individuals, the stability of personnel, and the

Most defendants plead guilty,[15] usually on the understanding that penal risk will be lessened. Sometimes the prosecutor agrees to dismiss charges or to recommend a particular sentence to the judge. Other times counsel negotiate the specific sentence the defendant will receive. As a constitutional matter the judge must either accede or else permit the defendant to withdraw his plea.[16]

Not one of the major new sentencing systems faces up to the squalid reality that most guilty pleas are induced by promises of leniency. Yet there is little reason to doubt that concessions remain necessary if the requisite number of defendants are to plead guilty, or that plea bargaining will persist, or that ways will be found to circumvent inconvenient, "unrealistic," and draconian sentencing standards. There are any number of ways, with or without judicial cooperation, to induce guilty pleas under even the most detailed sentencing tariff. If the appropriate sentence depends on the offense of conviction, cooperation can be rewarded by reducing or dismissing charges; the 30-month armed robber can be transmogrified into a 20-month robber or a 10-month thief. Sentence bargains that patently defy the tariff would require overt judicial acquiescence, which might make judges uncomfortable, but there are a number of subtler ways that judges and lawyers could carry out sentence bargains without appearing to defy the tariff.[17]

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policies (and oversight) of the separate bureaucracies. J. EISENSTEIN & H. JACOB, FELONY JUSTICE (1977) (Baltimore, Chicago, and Detroit), is probably the leading work, but the literature is large and growing. For recent book-length works *see, e.g.*, M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979) (New Haven, Connecticut); M. LEVIN, URBAN POLITICS AND THE CRIMINAL COURTS (1977) (Minneapolis and Pittsburgh); L. MATHER, PLEA BARGAINING OR TRIAL? (1979) (Los Angeles); P. UTZ, SETTLING THE FACTS (1978) (San Diego and Alameda Counties, California).

[15] *See* NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, SOURCEBOOK OF CRIMINAL JUSTICE—1978, Tables 5-19 (guilty plea rates as a percentage of conviction vary from place to place but are typically in the 85% to 95% range) & 5-30 (85% of federal convictions in 1977 resulted from guilty pleas).

[16] *See* Santobello v. New York, 404 U.S. 257 (1971).

[17] Even in a detailed prescriptive sentencing guidelines system in which judges were directed to impose the guidelines sentence in most cases, judges and lawyers could effect sentence bargains in at least three ways. Counsel could simply, with judicial acquiescence, settle

The prosecutor's enhanced influence under determinate sentencing has not gone unnoticed.[18] Several proposals have been made in order to prevent the prosecutorial manipulation of narrow sentencing guidelines or laws. The simplest proposal would legitimate overt "discounts" to defendants who plead guilty.[19] The most complex and imaginative proposal calls for establishment of "charge reduction guidelines" for the judicial decision whether to approve charge dismissals as part of a plea bargain.[20] However, the least satisfactory proposal, "real offense sentencing," is at the heart of the Model Act.[21] According to the sentencing

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on a below-guidelines sentence. Neither party would have reason or standing to object to the extra-guidelines sentence and the judge's non-compliance with the guidelines would pass legally unacknowledged. If outright judicial nonfeasance lacks subtlety, the same result could be achieved if the judge cited the defendant's guilty plea as the "justification" for a lenient departure from the guideline. If that candid admission of the effect of a guilty plea would make the judge uncomfortable, he could disingenuously assert a different rationale (the defendant's contrition, his good character, etc.) for the lenient sentence. The prosecution would not appeal the lenient sentence and the appropriateness or applicability of the judge's reasons would never be tested.

[18] *See* Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 751 (1980): "[T]he principal effect of a system of narrow sentencing guidelines would be to transfer discretionary sentencing power in guilty plea cases from federal district judges to assistant United States attorneys." *See also* Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

[19] *See* Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972).

[20] Both S. 1722, 96th Cong., 1st Sess. (1979) and H.R. 6233, 96th Cong., 1st Sess. (1979) propose creation of "charge reduction" guidelines, as part of a sentencing guidelines system, to set standards for the judge's decision whether to approve a charge reduction agreement. *See* CRIMINAL CODE REFORM ACT OF 1979, S. REP. No. 553, 96th Cong., 2d. Sess. 1235-36 (1979). The charge reduction device is based on S. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM (1979) and is discussed at length in Schulhofer, *supra* note 18. Charge reduction guidelines are subject to many of the problems of "real offense" sentencing. They gloss over the complexities of criminal court organization. They can be circumvented by means of the prosecutor's power to elect what charges to file and what to dismiss. Schulhofer's proposal founders on what he sees as a need to provide guilty plea incentives to defendants in the form of substantial guilty plea "discounts"—reduction in the otherwise applicable sentence. Overt guilty plea discounts may be unconstitutional. *See* Corbitt v. New Jersey, 439 U.S. 212 (1978). They are in several respects unsound as a matter of policy. In any event, Schulhofer effectively would abolish plea bargaining; his proposal converts charge reductions into guilty plea discounts, in other words into court-monitored sentence bargaining. Abolition of plea bargaining may or may not be possible but is probably better attempted directly. Experience in other countries and recently in Alaska suggests that abolition of plea bargaining may be less millenarian than is widely believed. See, on France and West Germany, Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381-428 (N. Morris & M. Tonry eds. 1980). On Alaska, see M. RUBINSTEIN, S. CLARKE, T. WHITE, ALASKA BANS PLEA BARGAINING [hereinafter cited as ALASKA].

[21] MODEL ACT at 114 (comment to § 3-104(e)), 126 (comment to § 3-109(1)), 144 (comment to § 3-115(b)(1)), 155 (comment to § 3-204(a)(1)), 157-60 (§ 3-206 and explanatory comments). Partial "real offense" systems have been proposed in which judges would sometimes look behind offenses of conviction to actual harms caused and losses suffered. The first sentencing guidelines project, in Denver, recognized that charge bargains would distort sentencing under sentencing guidelines. "The judges on our Steering and Policy Committee . . .

guidelines, the judge, the presentence report, and any appellate judge would ignore the offense of conviction: "In determining the appropriate guideline to follow the court shall consider the nature and characteristics of the criminal conduct involved *without regard* to the offense charged."[22] The goal is to liberate the judge from the consequences of the prosecutor's charging and bargaining decisions.

Objections to real offense sentencing range from the constitutional to the principled to the practical. Section I of this article introduces the Model Act's major sentencing proposals and suggests their deficiencies by chronicling the progress of an armed robbery suspect through the criminal justice system before and after implementation of the Model Act. Section II describes the proposed system of real offense sentencing in considerable detail. Suffice it to say that this writer is not enthusiastic about a proposal which requires that guilty pleas, trial verdicts, the law of evidence, the criminal burden of proof, and the substantive criminal law be ignored, with sentencing being based instead on the court's conclusions about what "really happened" without regard to the offense charged.[23]

Section III considers two additional major features of the Model Act. First the Model Act purports, but fails, to prescribe a retributive "just deserts" sentencing system that aims to treat similarly situated offenders similarly, to give high priority to pursuit of equality in punishment, and to proportion sanctions to defendants' moral culpability. Yet many provisions are avowedly incapacitative and deterrent and are inherently inconsistent with a retributive punishment program. Instead, the Act is moderately utilitarian in its aims and provisions, and clarity and coherence would be gained if it did not claim to be otherwise. A second problem is that the Act's provisions provide no reasonable assurance that they will achieve the Act's aim of treating defendants fairly and consistently. Proposed sentencing guidelines and statutory aggravating and mitigating circumstances, taken together, are highly vulnera-

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felt that the sentencing decision required more information concerning the underlying physical harm and/or property loss suffered by the victim than the mere statutory label of a plea-bargained conviction would provide them." WILKINS, KRESS, *supra* note 3, at 8. The solution selected was partially to deprive the defendant of the benefit of his bargain by use of a "harm/loss" modifer which could be used in some cases to increase the rated severity of the defendant's offense on the matrix that constitutes the sentencing guidelines. *Id.*, Appendix G., at 63-66. Real offense provisions in descriptive guidelines like Denver's may present different issues than in a prescriptive scheme like the Model Act. In the former case, the aim is to provide a somewhat truer picture of past practice: Denver's judges *do* look behind the "statutory label" and guidelines that fail to do so would obscure past practice. In a prescriptive system, the issue is "ought" not "is" and it is far from clear that real offense sentencing would be practiced in utopia.

[22] MODEL ACT § 3-206(d) (emphasis added).

[23] *Id.* § 3-207(d).

ble to manipulation by counsel and are unlikely to provide significant checks on sentencing decisions. Further, unlike most sentencing proposals which prefer concurrent to consecutive sentences, the Model Act reverses the pattern and creates a presumption in favor of consecutive sentences, thereby giving the prosecutor, through charging decisions, another manipulative tool.[24] Also, the Model Act permits prosecutorial appeal of sentences and permits the appellate court to *increase* the sentence of a defendant who appeals.[25] The former defies double jeopardy policies according to the Burger court, although apparently not Article V of the Bill of Rights.[26] The latter would inevitably have a chilling effect on appeals. Finally, in this Act, statutory good time, while generous, only partly vests. Correctional authorities would possess substantial effective control over release dates[27]—an irony in an Act that would abolish parole release because of its inconsistencies.[28]

Section IV suggests other plausible ways that sentencing reform might take the prosecutor into account and considers whether systematic real offense sentencing is more objectionable than our present system in which something like real offense sentencing is commonplace, though often surreptitious. The last point warrants repetition. Present practice in most jurisdictions follows a modified real offense system.[29] Under *Williams v. New York* and its lineals,[30] courts are free to consider whatever evidence they choose in deciding what sentence to impose. The gun that the prosecutor swallows when he accepts a plea of guilty to robbery for an armed robbery charge can reappear in the sentencing hearing. Even a sentence bargain may not protect the defendant from real offense sentencing. Parole boards often ignore the nominal offense of conviction and look behind it to "actual offense behavior."[31] If the

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[24] *Id.* § 3-107.

[25] *Id.* § 3-208.

[26] United States v. DiFrancesco, 101 S. Ct. 426 (1980).

[27] The Model Act would establish day-for-day good time; thus a 10 year sentence would on good behavior expire in 5 years. MODEL ACT § 3-501. However, up to three quarters of accumulated good time may in some cases be revoked. Hence, at the end of the fifth year of a 10 year sentence, multiple disciplinary infractions could be sanctioned by withdrawal of up to 3 years, nine months good time, and a single infraction up to two years, thereby possibly lengthening the effective prison term from 5 years to 8 years, 9 months. MODEL ACT § 4-502(c).

[28] If good time is generous and does not vest, prison authorities may effectively reconstitute the worst aspects of parole release—low visibility, ad hoc release decisions, prisoner anxiety, and the absence of published criteria and public accountability—without replicating the best—evening out sentence disparities and giving prisoners early notice of when they can expect to be released. *See* note 31 *infra*.

[29] *See, e.g.*, WILKINS, KRESS, *supra* note 3, at 8.

[30] Williams v. New York, 337 U.S. 241 (1949); *e.g.*, United States v. Grayson, 438 U.S. 41 (1978).

[31] *See, e.g.*, U.S. Parole Commission Rules, 28 C.F.R. § 2.20 (1980).

Model Act's real offense proposals are objectionable, then are not present practices just as bad? How can the prevalence of real offense sentencing be explained and justified? These questions are also explored in section IV.

I. THE MODEL ACT'S PROPOSALS FOR REFORM OF SENTENCING

The draftsmen of the Model Act deserve credit for their efforts to give order to complexity. The Act contains provisions that are intended to structure, counterbalance, or abolish the discretions of prosecutors, judges, and parole and correctional administrators.

The core proposal is that a part-time sentencing commission be established to promulgate presumptive sentencing guidelines. The Model Act does not specify the form these guidelines should take. However, to illustrate for heuristic purposes the kind of guidelines which the Act appears to envision, Table 1 sets out the guidelines matrix developed by the Minnesota Sentencing Guidelines Commission. All felonies are di-

TABLE 1

MINNESOTA SENTENCING MATRIX: SENTENCING BY SEVERITY OF OFFENSE AND CRIMINAL HISTORY

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	5 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana	I	12*	12*	12*	15	18	21	24
Theft-related Crimes ($150-$2500) Sale of Marijuana	II	12*	12*	14	17	20	23	27 25-29
Theft Crimes ($150-$2500)	III	12*	13	16	19	22 21-23	27 25-29	32 30-34
Burglary - Felony Intent Receiving Stolen Goods ($150-$2500)	IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
Simple Robbery	V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Assault, 2nd Degree	VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery	VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
Assault, 1st Degree Criminal Sexual Conduct, 1st Degree	VIII	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
Murder, 3rd Degree	IX	97 94-100	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
Murder, 2nd Degree	X	116 111-121	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

* one year and one day

Source: Minnesota Sentencing Guidelines Commission, Report to the Legislature 14 (1980) vided into ten categories; these are shown on the vertical axis. Defendants are divided into seven groups on the basis of their prior criminal records and these are arrayed on the horizontal axis. To find the applicable guideline sentence, one determines the severity level of the conviction offense and the defendant's prior record grouping by consulting the cell located at the intersection of the appropriate row and column. This cell indicates the number of months to be served by that particular defendant.

Under the Model Act, judges can deviate from guidelines when they state their reasons for their departure, but the sentence would be subject to appellate review initiated by either party. The Act proposes no direct controls on plea bargaining but would try to alleviate its effects by basing sentences on actual offense behavior and *not* on the offense of conviction. Parole release would be abolished[32]—no more effective prophylaxis comes to mind for minimizing inconsistencies in parole release decisions. Good behavior in prison would earn one day's good time credit for each day served and, thus, could halve nominal prison terms.

Notwithstanding the Model Act's admirably ambitious scope, real offense sentencing is its central idea, and real offense sentencing, regrettably, is not a good idea. Consider the case of Miles Standish before and after enactment of the Model Sentencing Act.

Miles Standish is a 22-year-old black man who has been arrested in Erewhon, a pseudonymous Eastern state, on armed robbery charges. He admits having been in a gasoline station in which an attendant was shot but denies that he intended to steal anything or to shoot the attendant. He claims that the white attendant insulted him by use of a racial slur, picked a fight, and pulled a gun; and that while he was struggling to defend himself, the gun discharged, hitting the attendant. Standish fled, and denies taking any money.

The attendant says that Standish entered the station with the gun, ordered the attendant to hand over the contents of the cash register, shot the resisting attendant, and fled taking the gun and $100.

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[32] Several states have "abolished" parole to a greater or lesser extent. Maine, Minnesota, Illinois, Indiana, and California are examples. Most have retained a period of parole supervision as a standard consequence of a prison sentence. Powerful arguments can be made for abolition of parole, but those made by the Model Act's draftsmen are among the least persuasive. The reasons mentioned are that continuing uncertainties about release dates debilitate prisoners and that parole "intensifies disparity." MODEL ACT, prefatory note, at 93. In better run parole systems—like that of the U.S. Parole Commission—neither criticism applies. Release dates are set in the early months of imprisonment, and, because of the parole guidelines, disparities are diminished, not increased. For more thoughtful assessments of the case for abolition of parole, see A. VON HIRSCH & K. HANRAHAN, THE QUESTION OF PAROLE (1979); Morris, *Towards Principled Sentencing*, 3, MD. L. REV. 267 (1977).

Ownership of the gun cannot be traced. When found during the course of a warrantless search of Standish's apartment, it bore only Standish's fingerprints.

Standish's defenses are, first, that he is factually innocent, that he committed no robbery. And, second, that if there were a robbery, it was of the simple, not the armed, variety.

Consider what would happen to Standish under present Erewhonian law.[33] Standish is indicted for armed robbery. At arraignment he pleads not guilty. His lawyer files a motion to suppress evidentiary use of the gun. The search was patently unconstitutional and the motion is granted.

The prosecutor offers to dismiss the armed robbery charge if the defendant will plead guilty to the lesser-included robbery charge. The defendant, on the advice of counsel, rejects the proposed bargain; counsel's reasoning is that the state cannot prove armed robbery without the fingerprint evidence and that Standish will not be convicted at trial of anything more serious than robbery. He tells Standish, "hold out for an offer to plead guilty to theft; otherwise the prosecutor is not giving you anything."

The prosecutor will offer no better bargain. At a trial before a jury, Standish is convicted of theft. He receives a prison sentence of two years, suspended. (Somewhat improperly, we question the jurors and learn that they could not decide beyond a reasonable doubt who was telling the truth about the gun, hence no armed robbery conviction. They thought that Standish probably did intend to commit the robbery but that the attendant did insult him with racial slurs, thus a "compromise" theft conviction.)

Now consider what would happen to Standish if Erewhon had adopted the Model Sentencing and Corrections Act. The early parts of the story do not change: armed robbery indictment, not guilty plea, successful motion to suppress, the prosecutor's offer to accept a guilty plea to robbery. Then things change a little. Standish's counsel opposes the charge bargain but for a very different reason. He tells Standish, "under the Model Act, if you are convicted, the judge will sentence you for armed robbery. Under the sentencing guidelines, with your record you will receive a prison sentence of 48 months. Hold out for a sentence bargain to something shorter." The prosecutor will offer no better bargain. There is a jury trial and Standish is once again convicted of theft (for the same reasons). At this point, things change mightily.

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[33] For heuristic purposes, the process has been truncated. For example, motions to suppress would normally be presented at a preliminary hearing before grand jury proceedings. Here the sequence is reversed.

As a matter of course, the judge will direct a "presentence service officer" to prepare a presentence report on, among other things, "the characteristics and circumstances of the offense,"[34] looking "behind the offense charged or the offense for which the defendant was ultimately convicted"[35] to the actual offense behavior. At a sentencing hearing, the court will consider the evidence admitted at trial or at the hearing (including the suppressed fingerprint evidence), the presentence report, and the sentencing guidelines. The guidelines are based on "offense behavior rather than the offense for which the defendant was ultimately convicted."[36] The court, in considering evidence and the guidelines, "shall consider the nature and the characteristics of the criminal conduct involved without regard to the offense charged."[37] The court will make its decision on the basis of "substantial evidence in the record of the sentencing hearing and the presentence report."[38] Standish will be sentenced as if he had been convicted of armed robbery and receive a 48 month prison sentence.

For Standish, the Model Act would deprive him of the protections of constitutional criminal procedure and the law of evidence (the suppressed fingerprint evidence), the substantive criminal law (armed robbery versus robbery versus theft), and proof beyond a reasonable doubt ("substantial evidence"). The comments to the Model Act neither attempt to justify so drastic an alteration of American law nor do they discuss the likely systemic impact of such a change.

II. CONTROL OF THE PROSECUTOR BY INDIRECTION—REAL OFFENSE SENTENCING

The prosecutor looms large in sentencing. Under finely tuned prescriptive sentencing systems like those of California[39] or Minnesota,[40] he may loom larger still. Plea bargains for specific sentences or prosecutorial agreements to recommend or not oppose a specific sentence may be amenable to control by sentencing guidelines, if we assume that judges will not condone overt sentence bargains that circumvent applicable guidelines. Charge bargaining however would become more important. If guidelines prescribe specific offenses, the power to initiate or dismiss charges is the power to determine sentence. The problem cannot be burked and the Model Act, to its credit, does not do so.

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[34] MODEL ACT §§ 3-203, 3-204(a)(1).

[35] *Id.*, comment to § 3-204(a)(1) at 155. The Comment continues: "The application of sentencing guidelines is based on the underlying criminal activity of the defendant and not on the formal charge or conviction."

[36] *Id.*, comment to § 3-115(b), at 144.

[37] *Id.* § 3-206(d).

[38] *Id.* § 3-207(d).

[39] *See* note 13 *supra*.

[40] Judges are expected to impose a sentence within the range provided in the applicable cell of the guidelines grid (*see* Table 1) except when "substantial and compelling" reasons exist to justify a different sentence. MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE (1980).

A. THE MODEL ACT'S REAL OFFENSE PROVISIONS

The Model Act contains a thorough application of its real offense approach to the control of plea bargaining. Section 3-115, the provision governing development of sentencing guidelines, directs the commission to consider "the nature and characteristics of the offense." The comment explains: "The language 'nature and characteristics of the offense' . . . authorizes the commission to utilize and the sentencing court to consider offense behavior rather than the offense for which the defendant was ultimately convicted. The major purpose of the provision is to reduce disparity resulting from the effect of plea bargaining."[41] Because neither the trial nor a guilty plea would determine the factual foundation of a sentence, the sentencing hearing would become critically important. Accordingly, sections 3-203 and 3-204(a) would require preparation of a presentence report setting forth, among other things, "the characteristics and circumstances of the offense."[42] Finally, section 3-206(d) requires the sentencing judge to consider the "nature and circumstances of the criminal conduct involved *without regard to the offense charged*." Although the critical facts would be determined at the sentencing hearing, the defendant would have no *right* to subpoena, call, or cross-examine witnesses.[43] Under section 3-207(d), the sentence "must be based on substantial evidence in the record of the sentencing hearing and the presentence report."[44] Thus the Model Act makes clear in these respects, and in others,[45] that sentencing is to be constrained by neither offenses charged nor offenses of conviction.[46]

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[41] MODEL ACT, comment to § 3-115(b).

[42] The applicable comment to § 3-204(a) (MODEL ACT at 155) explains: "The language requires [the presentence service officers] to go behind the offense charged or the offense for which the defendant was ultimately convicted." Oddly, § 3-115 on development of sentencing guidelines refers to the real offense in terms of "the nature and characteristics of the offense"; while § 3-204 on the presentence report refers to "the characteristics of the offense"; and § 3-206 on the judge's sentencing decision refers to "the nature and characteristics of the criminal conduct." Most well-drafted statutes would use a single phrase to refer to so fundamental a concept as the "real offense" in order to anticipate and avoid appeals based on wholly semantic differences. The inconsistency appears to be inadvertent. The comments to each section explain the plea bargain control strategy behind real offense sentencing.

I can divine no intended difference between the "offense" of § 3-115 and the "criminal conduct" of § 3-206. The phrase "criminal conduct" might denote conduct proven beyond a reasonable doubt in contrast to "alleged criminal conduct," but that distinction seems unlikely here.

The words "characteristics and circumstances" in § 3-204(a)(1) (as opposed to "nature and circumstances" in the other two sections) could, out of context, be construed to refer to the elements of the offense *and* to relevant aggravating and mitigating circumstances. However §§ 3-204(a)(2) and (4) require the presentence report separately to set forth information relating to aggravating and mitigating circumstances.

[43] MODEL ACT § 3-206(b). The court "may," but would not be obliged to, permit the defendant to subpoena, call, or cross-examine witnesses.

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[44] However, defendants may not be sentenced to enhanced terms for "especially aggravated offenses" or as "persistent offenders" except on the basis of facts proven beyond a reasonable doubt. *Id.* § 3-207(e)(2).

The provisions for enhanced terms are apparently intended to reduce maximum authorized sentences for most offenses by reserving long prison terms for cases of special severity. *See* comment to § 3-105, at 116. If long sentences were reserved for defined categories of offenders, maximums substantially lower than those now authorized in most jurisdictions would apply to most offenses. Extremely long prison sentences would be reserved for "especially aggravated offenses" or "persistent offenders." The *Study Draft* of the National Commission on Reform of Federal Criminal Laws proposed such a system. *See* text accompanying notes 133-34 *infra*. The aim is to build a two story sentencing structure. The first floor has a low ceiling and the second story is for persistent offenders, etc. Somewhat surprisingly, the Model Act does not propose a set of statutory sentence maximums (MODEL ACT at 107). Thus the first story well could have very high ceilings and the second story tower into the clouds. *See* §§ 3-104-06 and supporting comments. For an especially well-informed discussion of this two-story strategy for reducing the lengths of prison sentences, *see* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES (2d. ed. tent. draft 1979) [hereinafter cited as SENTENCING ALTERNATIVES].

[45] MODEL ACT § 3-102(6) establishes as a "principle of sentencing" that predictions of future criminality should play no role in sentencing "unless based on prior criminal conduct or *acts designated as a crime under the law*" (emphasis added). The relevant comment, *id.* at 102, explains that the "acts designated" language is intended to capture juvenile acts that would have led to a conviction for a crime had the offender been an adult. It's unclear from either § 3-102(6) or the comment whether an adjudication would be required or whether this is a "real"prior juvenile offense standard. In any event, the § 3-102(6) language is not by its terms restricted to juvenile records. Unless the comments were codified, courts would have opportunity to construe the section in broad "real offense" terms.

Section 3-109 on aggravating factors in sentencing includes "a recent history of convictions or criminal behavior." The comments, *id.* at 126-27, explain that "criminal behavior" encompasses criminal conduct of juveniles that resulted in an adjudication (note that this is less ambiguous than the 3-102(6) standard), and "allegations of criminal conduct or the underlying criminal behavior of convictions that were set aside as unconstitutionally invalid." The words "criminal behavior" in § 3-109 presumably refer (if they are used as defined in the comment) to the "real offense" underlying the unconstitutionally invalid conviction.

No reason is given in the comments for use of the different terms "acts designated as a crime under the law" in § 3-102(6) and "criminal behavior" in § 3-109.

Finally, § 3-104(e) permits imposition of enhanced fines on the basis of "transactions which are part of a scheme of criminal activity but not formally charged" (comment at p. 114).

Only § 3-105 defining "persistent offenders" for purposes of enhanced sentencing vulnerability takes a restrictive view of prior records and is limited to prior convictions and excludes convictions that have been set aside on appeal.

[46] § 3-206 and the comments to §§ 3-115, 3-204, and 3-206 expressly permit sentencing to disregard the offense *charged*. Powerful arguments could be developed that even so unprincipled a concept as real offense sentencing should be constrained by offenses charged. The Model Act clearly would permit sentencing of a defendant for a "real offense" with which he was not charged. For an example, consider a defendant who committed an armed robbery in which a victim was accidentally killed. Charged with armed robbery, the defendant pleads

B. WHAT'S WRONG WITH REAL OFFENSE SENTENCING?

The fundamental flaws of real offense sentencing are easily stated. The most basic are that it is incompatible with the basic values of our legal system and that it will not work. Those are the first two points discussed below. Other flaws range from objections based on concern for fairness and due process to practical objections based on likely inefficiencies.

1. Real offense sentencing is antithetical to basic notions of individual worth and liberty.

In part, no doubt, because of our historical and philosophical commitment to liberty, our system of criminal law justifies the imposition of criminal sanctions only on people whose acts or omisssions *in fact* violate the criminal law and who have admitted their unlawful acts or have been convicted at trial on the basis of proof beyond a reasonable doubt.[47] Real offense sentencing undermines the importance of the substantive criminal law, nullifies the law of evidence, and is irreconcilable with the notion that punishment can be imposed only in respect to offenses admitted or proven.[48] *For purposes of analysis, this section is premised on the conceit that counsel and judges would not systematically circumvent sentencing guidelines*. I employ the conceit, which I regard as highly unlikely, so

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guilty to robbery. The Model Act would not only permit the sentencing judge to look behind the robbery conviction to the "real offense" of armed robbery with which he was charged but even further to the "real offenses" of felony-murder or manslaughter. However, § 3-206(d) limits the maximum sentence to the statutory maximum authorized for the offense of conviction. That decision is explained in the comments, MODEL ACT at 159, in the following extraordinary understatement: "Serious constitutional objections would be raised if the court were authorized to impose a sentence in excess of that authorized by statute for the offense charged."

[47] The prevalent trend in the philosophy of the criminal law is to expose the moral basis of our constitutional preference for autonomy and to attempt to expose and where necessary rebuild the moral foundations of the criminal law. See G. FLETCHER, RETHINKING CRIMINAL LAW (1978); D. RICHARDS, THE MORAL CRITICISM OF LAW (1977); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979). Real offense sentencing and guilty plea discounts are a move in the opposite direction.

[48] The textual point is cognizant of the procedural and evidentiary latitude given judges by Williams v. New York, 337 U.S. 241 (1949), to consider a wide range of information when making sentencing decisions. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id.* at 251. *Williams* was concerned with the secondary question of the evidence admissible, and the governing probative standards, in deciding what sentence to impose in respect of an admitted or proven offense. The textual point is more basic—real offense sentencing is premised on a primary characterization of the criminal offense. The offense admitted by the defendant, or which was proven to a judge or jury's satisfaction beyond a reasonable doubt, is not a limiting factor in sentencing (unless the maximum sentence authorized by statute is less than that which would result under the real offense scheme). The offense proven beyond a reasonable doubt would often be a nullity. The real offense, based on a substantial evidence probative standard, would determine sentence.

that the Model Act may be considered in the best possible light, with all parties complying with it in complete good faith, however inconvenient that compliance may be and however uneasy the parties may be with the guidelines' sentences.

a. The substantive law. Criminal law is the most complex and subtle of the common law subjects.[49] The stakes—deprivation of liberty and property—are high, and the courts and legislatures specify the elements of offenses and defenses with exacting detail. The felony-murder rule, for example, varies among jurisdictions on the bases of such refinements as the underlying offense; the foreseeability of death; the nature of the killer's involvement in the predicate felony (whether he was the mastermind, a willing accomplice, driver of the getaway car, etc.); the identity of the victim; whether the killer was a felon, a victim, a bystander, or a peace officer; whether the death was intended, knowledgeable, reckless, or negligent; whether the death was "in furtherance" of the original criminal purpose; and whether it occurred before, during, or after the underlying offense. The defense of self-defense varies with the nature of the threat; whether a mistaken belief in a threat was reasonable or unreasonable; whether a person must retreat and thereby avoid the incident; whether the retreat rule is different on property one owns or occupies; the amount of force used in self defense; whether the original assailant has renounced his nefarious purpose and may himself justify assaultive acts on the basis of self-defense; and so on. Countless hours have been expended over centuries in wrestling with the byzantine intricacies of the substantive criminal law. Conviction and the resulting public labelling, denunciation, and possible deprivation of liberty, are too important to tolerate avoidable ambiguities. The requirement of a high burden of proof in criminal cases, with either an admission of guilt or proof beyond a reasonable doubt being necessary for conviction, is one acknowledgement of the importance of the interests and values implicated by the substantive criminal law.

Real offense sentencing side-steps the substantive law as if its refinements are so much superfluous metaphysic, rather than the exactingly developed fine print of the social contract. Under the Model Act the offense of conviction is but an inconvenience that can—if the statutory maximum sentence is lower than the appropriate real offense guideline sentence[50]—occasionally frustrate the sentencing process. The comments to the American Bar Associations's *Sentencing Alternatives and Procedures* characterize real offense sentencing as "a practice that risks infringing the appearance of justice and downgrading the significance of the trial."

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[49] Presumably teachers of property, torts, and contracts would give this sentence a different subject. They would be wrong. Property law is the quintessential body of law in which it is less important that rules be right than that they be settled. Much property law is carved in stone. Torts and contracts are etched in jello. Concerned with distribution of loss and money damages, not liberty, both have undergone rapid change in this century. The issues and arguments in criminal law are more enduring. Little of the argument in, for example, G. FLETCHER, RETHINKING CRIMINAL LAW (1978), would be unfamiliar to the nineteenth century English Criminal Law Commissioners. *See, e.g.*, HIS MAJESTY'S COMMISSIONERS ON CRIMINAL LAW, FIRST REPORT (1834).

b. The burden of proof. During the first week of law school every law student learns that, in Blackstone's words, "it is better that ten guilty persons escape than one innocent suffer,"[51] that those words are no less salient now than in the eighteenth century, and, accordingly, that the burdens of proof in the civil and criminal courts are different. Lawsuits in the civil courts are usually subject to probative standards of "more probable than not" or "balance of probabilities" or "preponderance of the evidence," while an accused wrongdoer becomes a convicted criminal only if he freely admits guilt or is proven guilty "beyond a reasonable doubt." The Model Act's provisions would in all cases replace proof "beyond a reasonable doubt" with proof based on "substantial evidence." It should go without saying that substantial evidence often will not support a conclusion "beyond a reasonable doubt."

Formally, real offense considerations under the Model Act would be raised after conviction, whether by plea or verdict, and the burden of proof would not be affected. The reality is different. Upwards of 90 percent of convictions in most jurisdictions result from pleas of guilty to particular charged offenses.[52] The remaining convictions result from verdicts rendered following bench and jury trials. In either case, the Model Act would authorize the court to sentence the defendant as if he had been convicted of a more serious offense. And, under section 3-207(d), the court's decision would be based not on proof beyond a reasonable doubt, but on "substantial evidence in the record."[53]

The Model Act overlooks fundamental distinctions among cases. Different considerations are presented by defendants who plead guilty, defendants convicted at trial on all counts, and defendants who are convicted at trial of some offenses and acquitted of others. In all cases, distinctions should be drawn between defendants convicted of the highest offense charged and those who plead guilty to lesser charges or are convicted of them.

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[50] Defendants of course must be released when the maximum sentence expires. Guidelines that specify a sentence longer than an applicable maximum are patently irrelevant.

[51] W. BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 27 (1765-69).

[52] *See* note 15 *supra*.

[53] Under other provisions of the Model Act, the quality of the record may be substandard. Defendants could cross-examine, call, and subpoena witnesses only with the court's consent, MODEL ACT, § 3-206(b). The presentence report would provide the factual base in most cases. Although the "presentence service officer" could, with the court's permission, be examined, much of the contents of his report and his testimony would constitute inadmisible hearsay were the rules of evidence applicable. They are not. *See* note 57 and accompanying text *infra*.

The defendant who pleads guilty to the highest charge concedes his guilt. Neither he nor the defendant convicted at trial of the highest offense charged can complain that the facts supporting conviction were insufficiently proved.[54] Both can complain if they are sentenced as if they had been convicted of a yet more serious offense with which they were not charged—a result the Model Act prescribes. Section 3-206(d) directs the judge to disregard the offense charged, thereby addressing the distortions that result from prosecutors' charging decisions, but only by sentencing the defendant for committing an offense against which he had no opportunity to defend.

The most rudimentary due process requires notice of accusations and an opportunity to respond.[55] At its most extreme reach, the Model Act would allow a judge to justify a sentence on the basis of uncharged criminal conduct unrelated to the offense charged. The inventory of the rape defendant's personal possessions when arrested may reveal marked bills traceable to a robbery. It is hard to imagine that a sentence would pass constitutional muster if the judge announced that a lengthy prison term for a rape defendant is justified by an uncharged "real offense" of armed robbery. The line is a fine one—if there is such a line—between this example and a case in which the defendant charged and convicted of robbery is sentenced for the real offense of armed robbery. In either case, the "real offense" may never have been discussed nor the factual basis for it explored at trial or during plea negotiations. Perhaps the defendant would not have pled guilty to the higher offense if he had been charged with it, or would have presented evidence and legal argument contesting its appropriateness. When, therefore, he is sentenced as if he had been charged with the higher offense, he could fairly say that he had not been proven guilty: the *only* salient evidentiary finding would be based on substantial evidence. For him, proof beyond a reasonable doubt simply would not apply.[56]

The problem is similarly stark for the defendant who pleads guilty to a lesser charge in consideration of charge dismissals.[57] Not only would the Model Act permit punishment for acts not proven, it would unfairly deprive the defendant of the benefit of his bargain. The defendant's guilty plea and waiver of trial rights are the price paid for immunity from punishment for the more serious dismissed charge. A principled legal system should be uneasy about institutionalized deceit. As, however, this is precisely the result which the Model Act's provisions are designed to reach, nothing more will be said here about it. The Model Act's proponents could presumably argue that rational defendants would cease pleading guilty on the inducement of charge dismissals and no unfairness would occur.

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[54] With the exception of defendants who enter Alford pleas in which they deny guilt but plead guilty. *See* North Carolina v. Alford, 400 U.S. 25 (1970).

[55] *See* Goldberg v. Kelly, 397 U.S. 254 (1970). The important post-sentencing cases establishing minimum procedural requirements when "grievous loss" may be imposed are Vitek v. Jones, 100 S. Ct. 1254 (1980) (transfer from prison to mental institution); Wolff v. McDonnell, 418 U.S. 539 (1974) (prison disciplinary procedures); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation).

[56] It is unclear why any defendant would plead guilty if he obtains no sentencing benefits

Sentencing a defendant for committing an offense of which he was acquitted presents considerable ethical problems.[58] Suppose that a rape prosecution resulted in jury conviction for assault. From the rape acquittal, the law infers only that there was reasonable doubt of the defendant's guilt A judge's decision that there is substantial evidence to support a sentence premised on rape is completely reconcilable with the jury's reasonable doubt, but no principled system of criminal law could responsibly permit sentencing on such a basis. The symbolism and high drama of the criminal court would be displaced by the artifice and illusion of a shell game.

If the Model Act does not expressly abrogate the criminal law burden of proof, it seriously undermines it. Judges are free under existing law to range widely in consideration of sentences, but that is hardly germane. Judges impose sentence in respect of a specified offense of conviction. Under the Model Act, judges would, in effect, simultaneously determine the offense of conviction and the sentence, and would do so on the basis of substantial evidence received free of the rules of evidence.

c. The law of evidence. This point requires little elaboration. Most of the argument was adumbrated in the preceding two subsections. The law of evidence consists of a body of elaborate rules governing the ad-

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directly or indirectly. The Model Act ignores the problem of providing inducements to guilty pleas. This problem is discussed in the text accompanying notes 63-64 *infra*.

[57] The U.S. Parole Commission routinely disregards the effects of charge reduction guilty pleas by basing the presumptive date for early release on the actual offense behavior. Factual disputes are resolved on the basis of a "preponderance of the evidence." U.S. Parole Commission Rules, 28 C.F.R. § 2.19(c) (1980).

[58] Schulhofer, *supra* note 18, at 766. Schulhofer discusses this point and the leading cases at 765-68. The New York State Parole Board did, for a time, treat a partial acquittal as if it were a dismissed charge. That policy was later modified. *Id.* at 766-67 n.141. The U.S. Parole Commission's Rules provide: "[T]he Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt)." 28 C.F.R. § 2.19(c) (1980).

missibility of evidence. Some of those rules (e.g. that wives cannot testify against their husbands under any circumstance) have outlived their original justifications, but most are concerned with the reliability of evidence and the quality of the inferences it supports. "Real offense" sentencing would effectively repeal the law of evidence in criminal cases.

It has long been clear that the law of evidence does not apply at a sentencing hearing.[59] Under the Model Act, the critical factual determination would be made at the sentencing hearing. For that vast majority of defendants who plead guilty, the law of evidence now plays some role in plea bargaining. Under real offense sentencing it would simply be meaningless. Under present law, calculations of the impact of evidentiary rules on the admissibility of important evidence are sometimes part of counsels' calculus as they plea bargain. Under real offense sentencing, admissibility at trial is irrelevant because a guilty plea to any charge will expose the defendant to sentencing for the real offense, without regard to the trial record.

Admittedly, the law of evidence is only marginally relevant in most guilty plea cases. However, in cases that go to trial, application of the rules of evidence may be the basis for conviction of one offense rather than another. Thus the law of evidence can, and often does, play a crucial role in the determination of guilt at trial. Yet, once the trial is over, the judge under the Model Act could ignore the trial record and, relying on the presentence report, sentence the defendant as if he had been convicted of the very offense of which he was acquitted.

The criminal law's formal insistence that individuals be vulnerable to punishment for crime only on the basis of proof beyond a reasonable doubt, supported by reliable evidence that they have committed a closely defined substantive offense, underscores the primacy of individual liberty and its corollary—limited state power—in our constitutonal scheme. None of those values are enhanced or acknowledged by the Model Act's sentencing provisions.

2. *Real offense sentencing is unlikely to reduce the impact of plea bargaining on the sentencing process*

The preceding subsection was premised on the conceit that lawyers and judges would not circumvent the Model Act. Circumvention, however, is likely to be the reality.

The real offense provisions are intended "to reduce the impact of plea bargaining on the sentencing process."[60] "If guidelines are based on the offense charged [offense of conviction?], the prosecuting attorney is given substantial leverage in dictating the sentence."[61] The only caveat is that the offense of conviction would establish a statutory maximum allowable sentence, whatever the guidelines provide. Thus, if the guideline sentence is five years and the statutory maximum is two years, the two-year maximum perforce would govern.

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[59] *See* Williams v. New York, 337 U.S. 241 (1949), which was recently reinvigorated by United States v. Grayson, 438 U.S. 41 (1978).

[60] MODEL ACT, comment to § 3-206(d). Somewhat surprisingly, a lengthy exposition of

Real offense sentencing under the Model Act is unlikely to prevent manipulation of guidelines by counsel for at least four reasons. First, if the Model Act were in effect and followed, there would be no incentive for defendants to plead guilty; the guilty plea would neither earn a sentencing concession nor reduce uncertainty. Second, prosecutors and defense counsel could circumvent the guidelines by developing new plea bargaining patterns; the medium of exchange would be the offense class and its accompanying statutory maximum sentences. Third, plea bargaining is in part the product of the personal and institutional needs of defendants and defense counsel, and prosecutors and judges. If an assortment of institutional needs requires the prosecutor to finds ways to reward guilty pleas, the court's other functionaries are likely to be willing collaborators.[62] Fourth, within its four corners, the Model Act gives the prosecutor potent manipulative powers. He can elect whether to invoke special provisions for extended terms for "persistent offenders" and "especially aggravated offenses"; he can influence whether consecutive sentences are imposed through his charging and dismissal decisions; he can elect whether to allege the presence of aggravating circumstances; he can, as noted earlier, control the maximum allowable sentence by means of his charging and charge dismissal powers.

a. Incentives to plead guilty. The conventional view is that the efficient operation of the courts requires that a majority of defendants plead guilty.[63] Guilty pleas are induced by the prospect or certainty of

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the *Model Act* by its principal draftsmen makes no reference to the real offense sentencing provisions. *See* Perlman & Stebbins, note 1 *supra*.

[61] MODEL ACT, comment to § 3-206(d).

[62] *See* text accompanying notes 64-78.

[63] *See, e.g.*, Chief Justice Burger's opinion for the Court in Santobello v. New York, 404 U.S. 257, 260 (1971): "[Plea bargaining] is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *See generally* A. BLUMBERG, CRIMINAL JUSTICE (1967); Alschuler, *The Prosecutor's Role In Plea Bargaining*, 36 U. CHI. L. REV. 51 (1968). The contrary view, that plea bargainng results not from case pressures but from the mutual interest of defendants, lawyers, and judges in handling straightforward cases economically and efficiently, has been developed at length in M. HEUMANN, PLEA BARGAINING (1978). *See also* M. FEELEY, *supra* note 14, ch. 8; Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC'Y REV. 407, 415 (1973); Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52 (1967).

less severe sentences than would otherwise obtain. Defendants who are rational calculators would, in general, waive trial rights and plead guilty only if the guilty plea would yield a probable punishment less than the probable punishment following conviction at trial times the probability of conviction. If counsel could not manipulate sentencing guidelines to provide sentencing concessions, under the Model Act defendants would have no incentive to plead guilty. This would be especially true with narrow guidelines, like the Minnesota guidelines in Table 1, which would make sentences highly predictable. Under present practice in most jurisdictions, the alternative to a plea bargain is to risk sentencing by a judge, subject to no meaningful standards and with great statutory latitude. Sentencing by the court thus entails the risk of an extremely severe sentence, relative to sentences received by other defendants convicted of that offense. The choice under present law may be between a sentence bargain to a two-year sentence; or a guilty plea to a charge carrying a five-year maximum, if the defendant pleads guilty with a charge bargain; or the risk of any sentence up to 25 years if he is convicted at trial or submits an unbargained guilty plea.

Under the uncircumvented Model Act, without plea bargaining or manipulation, conviction on plea or after trial should produce the same, reliable known sentence. There would be no incentive to plead guilty and every incentive to plead not guilty in the hope that the vagaries of trial would produce an acquittal or at least defer an inevitable prison sentence.

If many more defendants took their chances at trial, judges and lawyers would have to work harder, facilities would be overburdened, and the operation of the criminal courts would be made more expensive. Some method would be found to re-establish a tolerable equilibrium. The likeliest method would be to circumvent the guidelines.[64]

b. Circumvention of guidelines. No court could easily handle a quantum increase in the number of trials. Some way would have to be found to reward guilty pleas. Prosecutors are under pressure to keep the cases flowing, to hold the backlog down, and to minimize the number of trials. Defense counsel need to be able to demonstrate to their clients that they are earning their fees. At the same time the majority of defense counsel whose practices depend on high volume cannot afford to try many cases.[65] Thus, there would be every motive for counsel to negotiate a plea arrangement that would frustrate the applicable guidelines. The simplest stratagem would be for the judge to accept a plea to a charge bearing a maximum authorized sentence *less* than the sentence specified by real offense guidelines. If the guideline sentence for robbery, under specified circumstances, is, say, four years, it could be avoided if the defendant pled guilty to a lower-severity felony, say theft, that has a lesser statutory maximum sentence, say three years, or to a misdemeanor, say petty larceny or simple assault, bearing a one year statutory maximum sentence.

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[64] Schulhofer, *supra* note 18, recognized that efforts to circumvent guidelines will be inevitable unless defendants are offered a guilty plea inducement. His solution is to offer regulated open guilty plea "discounts." He poses the further question whether, with sentencing uncertainties diminished, defendants might increase their requests for jury trials. He discusses the implications of adding jury trial waiver "discounts" to the system of guilty plea discounts. *Id.* at 796-98.

Or, if manipulation by juggling charges is too overt, prosecutors and defense counsel could easily find other methods. Charge bargaining could move back to an earlier stage in the process. In the nineteenth century, bargaining sometimes took place in the station house.[66] If that is too bold or complicated, bargaining could move to the preliminary hearing stage, before grand jury consideration, and the prosecutor could seek an indictment only to the lesser offense to which the defendant has agreed to plead guilty. Or the prosecutor could simply *nolle* all but the agreed charges of conviction.

Most of these methods require at least the acquiescence of judges. Of course, if the judge would cooperate, counsel could sentence-bargain despite the guidelines, or reach a firm agreement that the defendant would receive a relatively lenient sentence because of "mitigating" circumstances. There are three ways judges and prosecutors can effect sentence bargains under sentencing guidelines. Counsel can simply, with judicial acquiescence, settle on a below-guidelines sentence. Neither party would have reason or standing to object to the extra-guidelines sentence and the judge's non-compliance with the guidelines would pass unacknowledged. If outright judicial nonfeasance lacks sublety, the same result could be achieved if the judge cited the defendant's guilty plea as the "justification" for a lenient departure from the guideline. If candid admission of the effect of a guilty plea makes the judge uncomfortable, he can disingenuously assert a different rationale (the defendant's contrition, his good character, etc.) for the lenient sentence. The prosecution would not appeal the lenient sentence and the appropriateness or applicability of the judge's reasons would never be tested. How likely is the judge to cooperate with one or another of these artifices? Very likely, indeed.

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[65] The evaluation of Alaska's abolition of plea bargaining concluded that, by and large, prosecutors adhered to the Attorney General's directive, with different consequences for defendants represented by union-provided prepaid legal service plea lawyers and the bulk of defendants who were represented by public defenders, court-appointed and private counsel. The "pre-paid" attorneys earned a guaranteed market level hourly rate and thus "were encouraged to devote extra time to matters which might otherwise have received more cursory treatment." Other counsel, unable as before to obtain negotiated settlements, experienced greater economic pressure than theretofore and felt some tension between their personal financial concerns and full adversary representation of clients. ALASKA, *supra* note 20, at 37-43, 240-410.

[66] Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273 (1979). Somewhat similarly, a Rand Corporation analysis of the impact of California's determinate sentencing law found that "there was an appreciable increase . . . in the percent of convictions based on guilty pleas at the time of arraignment." In other words, bargaining had apparently shifted forward in the process to a point where the charges in the information were not yet settled. A. LIPSON & M. PETERSON, CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING: A REVIEW AND AGENDA FOR RESEARCH 16 (1980).

c. The court work group. Patterns of relations among court functionaries vary widely from place to place and from time to time. Few useful generalizations can be made. What is clear, however, is that sentencing decisions result from a complex interplay of personal relations, institutional needs, and behavioral norms that constitute the subculture of a given court.[67]

Courtroom cultures vary. In some places, the judge is the dominant figure;[68] in other places, the prosecutor.[69] Occasionally a well-supported Public Defender's office possesses unusual influence.[70] Well-settled norms exist in some courts about the handling of cases; working relations are stable and colored by personal and social relations. When relations are stable, expectations seem often to be settled, and persistent non-compliance with expectations is sanctioned.[71] Less stable relations

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[67] *See, e.g.*, works cited in note 14 *supra*. This approach to understanding courts was launched by the appearance in 1967 of A. BLUMBERG, CRIMINAL JUSTICE.

[68] *See, e.g.*, the accounts of Minneapolis and Pittsburgh courts in M. LEVIN, *supra* note 14.

[69] *See, e.g.*, the analysis of the operation of San Diego courts in P. UTZ, *supra* note 14.

[70] *See, e.g.*, the analysis of the operation of Alameda County (Oakland), California courts, *id.*

[71] Consider, for example, the following description of the norms of Chicago felony courts, where work groups were fairly stable:

> In most courtrooms, informal norms developed. Judges accomodated the work schedules of prosecutors and defense counsel. For instance, attorneys trying cases in a courtroom automatically obtained a continuance in other courtrooms where they had a matter scheduled. Both judges and prosecutors often tried to help retained regulars collect their fees. Prosecutors took care to keep judges informed about what cases were likely to go to trial and sought to build and preserve a reputation for reliability and reasonableness. Defense attorneys had perhaps the most developed set of courtroom norms, which included the following strictures:
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> 1. Never make the state's attorney answer unnecessary motions.
> 2. Don't mess up someone else's schedule, especially by leading him to think you are ready to proceed when you are not.
> 3. Disclose the nature of your case informally in chambers or hallways.
> 4. Don't trap the state in a bind over the 120-day rule.
> 5. Accommodate the prosecution wherever possible.
> 6. Avoid trials for cases that cannot be won. (Trying cases when there is a chance of winning was not considered a violation of the norm.)
>
> Although one or another of these norms could occasionally be violated with impunity, consistent violation met with sanctions from the courtroom workgroup. Violators found themselves waiting half a day for a continuance, while other attorneys were taken care of

produce less settled norms and greater room for idiosyncracy. The relations among judges, prosecutors, and defense lawyers are symbiotic. While the nature of the symbiosis differs, it must be taken into account when thinking about changes in the court's patterns of cooperation.

The judge and counsel are often collaborators, not antagonists, and they share common goals: minimize the number of trials, keep the cases flowing and the backlog down, accommodate institutional and personal needs, achieve reasonable results. Even when counsel are more adversarial and antagonistic, they share case flow and efficiency goals.[72] If prosecutors and defense counsel are strongly of the view that plea bargains are important to their ends, judges are unlikely in many courts to behave "unreasonably" and insist on a mechanical application of guidelines. Low-level judicial cooperation would likely produce acquiescence in bolder forms of charge bargaining. Active judicial cooperation may well produce sentence bargains inconsistent with the guidelines and bargained "mitigations" of sentence that defy the guideline draftsmen's goals.

d. Manipulation under the Model Act. The preceding subsections describe several artifices by which counsel could circumvent a system of real offense sentencing guidelines. They need not be so creative under the Model Act, for it contains several provisions that would permit the parties to avoid the guidelines. First, the Model Act permits enhanced sentences for "persistent offenders"[73] and "especially aggravated offenses."[74] The enhancements could be imposed, however, only at the initiative of the prosecutor.[75] Second, the Model Act contains a presumption in favor of consecutive sentencing. Although there are limits to the presumption's scope, as a general matter the prosecutor could determine sentence, under the guidelines, through his charging and charge dismissal decisions.[76] Finally, he can allege aggravating circum-

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immediately. The opportunity to show off for a client would be denied, or the attorney would be scolded from the bench for petty matters that ordinarily were overlooked. In the absence of a strong defender organization that might counteract them, these norms bound many defense counsel closely to the courtroom organization.

J. Eisenstein & H. Jacob, *supra* note 14, at 108-09.

[72] *See, e.g.*, P. Utz, *supra* note 14, where San Diego and Oakland courts are described as being more adversary than are the Chicago courts described in J. Eisenstein & H. Jacob, *supra* note 14.

[73] Model Act § 3-105.

[74] *Id.*, § 3-106.

[75] *Id.* § 3-207(e).

[76] *Id.*, § 3-107. The comments acknowledge the dangers of prosecutorial manipulations. *Id.* at 121. § 3-107 contains a "single course of conduct" exception. Thus a defendant would not receive consecutive sentences for both burglary and possession of burglar tools. The comments pose, but don't answer, the question whether a forger or passer of bad checks should receive consecutive sentences for each separate offense. By silence, the comments suggest that

stances that would justify a severe deviation from the guidelines.[77] In all of these things the prosecutor would have authority under the Model Act to affect or determine sentence, and, given his institutional needs and those of other participants in the process, he is likely to be willing to bargain about its exercise.

3. Real offense sentencing is unfair

There are two basic injustices which make real offense sentencing unfair. The first is the likelihood, discussed in the preceding subsection, that defendants will be sentenced for committing an offense with which they were not charged or which was dismissed or of which they were acquitted. The second, discussed in this section, is that defendants will be deprived of the benefits of their bargains.[78]

No doubt some defendants plead guilty from contrition, ignorance, or naivete.[79] But presumably most act as rational calculators who weigh the probable punishment given charge dismissals (P_1) against the probable punishment given conviction at trial (P_2) times the probability of conviction (C). Defendants in general should accept a charge dismissal plea bargain only if $P_1 < C(P_2)$.

Of course defendants make mistakes. They must act on imperfect knowledge and may misvalue P_1, P_2, or C; nonetheless, some such calculation must take place. The defendant's guilty plea and waiver of rights are the price paid for immunity from punishment for the more serious dismissed charge. (More precisely, the guilty plea should buy the incremental difference in punishment ($C(P_2) - P_1$). One might well ask why a defendant would plead guilty in consideration of charge dismissals if the conviction offense does not matter, that is, if P_1 and P_2 have the same value.

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the presumption in favor of consecutive sentences would apply. In short, the prophylactic provisions aimed at preventing prosecutorial abuse appear weak.

[77] *Id.*, §§ 3-109, 3-204.

[78] Under real offense sentencing there would be no benefit from the bargain. One generous view of the Model Act is that it is a subtle method for abolition of plea bargaining: Judges presumably should not accede to sentence bargains; real offense sentencing would nullify charge bargains. If charge bargains have no effect, there would be no reason to go through the motions. The absence from the Model Act of any discussion of the likely accommodative behavior of prosecutors and defense counsel makes the Trojan horse interpretation unlikely.

[79] The Model Act's draftsmen might want to distinguish between those dismissals (and failures to charge) that result from plea bargains, and those that do not. In the former case, the draftsmen's aim to counterbalance plea bargaining distortions could be pursued. By looking at the conviction, and not the "real" offense in the latter cases, some unfairnesses could be avoided. The difficulty, regrettably, is that the judge can't ascertain the prosecutor's "real" intentions. Thus the border between bargained and unbargained dismissals would be impossible to police.

Real offense sentencing would involve a form of misrepresentation that would not be tolerated in most marketplaces: People who buy Oldsmobiles expect to receive Oldsmobile engines; if they had wanted Chevrolet engines they would have paid less. Courts and public officials showed little hesitancy about protecting the reasonable expectations of Oldsmobile purchasers. People who buy charge dismissals expect to receive favorable sentencing dispositions. Surely when constitutional rights and personal liberty are at stake, marketplace dealings in justice should be at least as honest as marketplace dealings in cars.

Plea bargaining was only recently legitimated. Not so long ago, a successful plea bargain in many jurisdictions required that defendants be thespians who would perjure themselves by denying that their pleas resulted from anything other than acts of contrition or resignation. They could not say that inducements were involved. Fortunately the need for those charades is past. In *Blackledge v. Allison*, the Supreme Court observed that "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly admininstered, they can benefit all concerned."[80] Due process requires that the prosecutor keep his plea bargainng promise.[81]

The Supreme Court has emphasized that plea bargains *are* bargains. In *Bordenkircher v. Hayes*,[82] Justice Stewart stressed the "mutuality of advantage" provided to prosecutors and defendants by plea bargains and observed, "by hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of a possibility of a greater penalty upon conviction after a trial."[83]

The defendant who enters into a charge bargain renounces his right to be tried before a jury or a judge, to benefit from the rules of evidence and the uncertainties of trial, and to be acquitted unless proven guilty beyond a reasonable doubt. To permit the prosecutor to induce defendants to plead guilty by enforceable promises of charge dismissals[84] and then deny the effect of the dismissals by punishing the defendant as if he had been convicted of the dismissed charges is patently shabby. Whatever the constitutionality of such a denial to the defendant,[85] it would offend the values that underlie the constitutional concerns.

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[80] 431 U.S. 63, 71 (1976).

[81] Santobello v. New York, 404 U.S. 257.

[82] 434 U.S. 357 (1978).

[83] *Id.* at 363. See Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977).

[84] "Enforceable" in the sense that the defendant may withdraw his guilty plea if the prosecutor breaks his promise. *See, e.g.*, FED. R. CRIM. P. 11.

[85] *See* Schulhofer, *supra* note 18, at 765. "Reliance by the sentencing judge on actual offense behavior, properly ascertained, would likely survive constitutonal attack." *Id.*

4. *Real offense sentencing is inefficient*

Because real offense sentencing is based on facts not necessarily encompassed in the elements of the offense of conviction, defendants could be expected routinely to contest facts alleged in the presentence report. A defendant, under the Model Act, would not be entitled to confront his accusers, to subpoena witnesses, to present evidence, or to cross-examine adverse witnesses (although it is within the court's discretion to do these things, if it so chooses).[86] Stephen Schulhofer has argued convincingly that a conscientious judge would want to hold an anomalous evidentiary hearing about genuinely disputed facts, even on matters that both counsel would rather not litigate. Also, no matter what the outcome of the hearing, the real offense determination would incur serious social costs. "The significance of the formal conviction would be depreciated, the defendant might feel he or she had been 'had,' and society would lose the effect of the longer statutory sentence range that would have been applied if the actual offense behavior had been determined by trial."[87]

Even with the streamlined procedures of a sentencing hearing, contested hearings over actual offense behavior would be likely to consume substantially more court time than sentencing hearings now do. Even if defendants were neither driven nor induced to go to trial (as they might be with the plea bargaining incentive removed), thereby imposing a workload increase, the increase in court time required to handle real offense sentencing hearings would, no doubt, be considerable.

5. *Real offense sentencing under the Model Act is probably unconstitutional*

Real offense sentencing, as manifested in the Model Act, is probably unconstitutional. The Model Act does not limit real offense considerations to the offense of conviction or to the offenses charged. In extreme cases, section 3-206(d) would allow judges to sentence for a real

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Schulhofer's conclusion is however premised on the view that such a finding would result in a "grievous loss" and therefore would require, for constitutional reasons, that the defendant be allowed to present and cross-examine witnesses. Under § 3-206(b) of the Model Act, the court "may" but need not permit such examinations. The general argument for the constitutionality of real offense sentencing in a guidelines system would be based on the broad latitude given judges in consideration of evidence relevant to sentencing. Williams v. New York, 337 U.S. 241 (1949); Specht v. Patterson, 386 U.S. 605 (1967); and on the cases upholding the constitutionality of the U.S. Parole Commission's decision to refer to the real offense in setting presumptive release dates, *see* Billiteri v. U.S. Board of Parole, 541 F.2d 938 (2d Cir. 1967). On the first argument, *see* the able summary and discussions in SENTENCING ALTERNATIVES, *supra* note 44, at 153-55.

[86] MODEL ACT § 3-206(b).

[87] Schulhofer, *supra* note 18, at 767-70.

offense more serious than the offense endorsed or for a more serious offense of which the defendant was acquitted. A defendant could be sentenced as an armed robber in the following three importantly different cases: *Case 1*—he was charged with armed robbery but pled guilty to theft; *Case 2*—he was charged with theft and pled guilty to theft (or some lesser offense); *Case 3*—he pled not guilty and was acquitted of armed robbery but convicted of theft.

The three cases raise separate issues. Case 1 raises the general issue of real offense sentencing. The Supreme Court, in *Williams v. New York*,[88] accorded wide evidentiary latitude to judges in setting sentences, including, in that case, consideration of alleged burglaries of which the defendant was not convicted. Given that wide latitude, reaffirmed in *United States v. Grayson*,[89] simple real offense sentencing is likely to survive constitutional challenge.[90]

Case 2 raises more difficult notice questions. If the defendant is charged with theft and pleads guilty to theft but is sentenced for armed robbery, he is certainly entitled to object that he was not adequately informed of the charges against him. Although there are cases that uphold consideration of charges of which the defendant was acquitted or of charges dismissed as part of a plea bargain,[91] those cases present fundamentally different issues. Those defendants were adequately apprised, by means of indictment or information, of the charges against them.

Lack of notice should be a fatal flaw in Case 2. The precise issue has, of course, never been raised. There are no avowed real offense sentencing systems. However defendants in later stages of the criminal process may not be subjected to "grievous loss" except following written notice of material charges. Written notice is a constitutionally required condition precedent to probation revocation (*Gagnon v. Scarpelli*),[92] parole revocation (*Morrissey v. Brewer*),[93] and prison disciplinary proceedings (*Wolff v. McDonnell*).[94] No plausible argument can be made that the defendant in Case 2 has less important interests at stake than if he were threatened with revocation of parole or probation or loss of good time.

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[88] 337 U.S. 241 (1949).

[89] 438 U.S. 41 (1978).

[90] The comments to the Model Act place primary reliance on the cases upholding the constitutionality of the U.S. Parole Commission's reliance in its guidelines on "actual offense behavior" determinations. For reasons discussed in Part III of this article, the argument from parole to sentencing is less than compelling.

[91] *See, e.g.*, United States v. Needles, 472 F.2d 652 (2d Cir. 1973) (dismissed counts of indictment); United States v. Sweig, 454 F.2d 181 (2d Cir. 1972) (acquittal); United States v. Doyle, 348 F.2d 715 (2d. Cir. 1965), *cert. denied*, 382 U.S. 843 (1965) (circumstances of offenses charged in multi-count indictment although defendant pled guilty to only one count).

[92] 411 U.S. 778 (1973).

[93] 408 U.S. 471 (1972).

[94] 418 U.S. 539 (1974).

Argument could be made that disclosure of the presentence report, which would describe the real offense, should satisfy the notice requirement. But if that is so, the state may as well indict generically for "criminal conduct," in all cases, with the details to be provided and to be used as the basis for the determination of sentence at the sentencing hearing. Courts could easily distinguish between ad hoc "real offense" decisions of individual judges and general rules that nullify the offense of conviction and thereby deny the defendant the protection of principles and standards that are basic to our criminal jurisprudence.

Real offense sentencing in Case 3 would also raise serious constitutional questions. One major objection would be that defendants simply should not, as a matter of due process, be punished in respect of conduct of which they were acquitted. In *Giacco v. Pennsylvania*,[95] the Supreme Court invalidated, as void for vagueness, a Pennsylvania statute that permitted the jury to impose court costs on an acquitted defendant. In separate concurrences, Justice Stewart wrote that "Pennsylvania allows a jury to punish a defendant after finding him not guilty. That . . . violates the most rudimentary concept of due process of law,"[96] and Justice Fortas observed, "[T]he Due Process Clause . . . does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged."[97]

Giacco can be distinguished from Case 3 on several bases: the defendant in *Giacco* was acquitted of all charges; the acquittal was a jury decision; the underlying question of imposition of costs on an acquitted defendant was not reached. Moreover, decisions have upheld the constitutionality of considering conduct that resulted in an acquittal when sentencing alleged criminals.[98] These decisions, however, involved acquittals in separate prosecutions. Whether they would be extended to reach acquittals in the case for which sentencing is being imposed remains to be seen, but it seems unlikely.

It may also be that objections noted earlier—that the Model Act's provisions undermine and trivialize the law of evidence, the burden of proof, and the substantive law—are procedural defects of constitutional gravity. Finally, real offense sentencing in Case 3 appears to offend double jeopardy notions.

Whatever the applicability of existing case law, the values that underlie due process must be offended by a sentencing system that would deprive defendants of the benefits of their acquittals. Even if real offense sentencing in partial acquittal cases did not offend double jeopardy values, and was governed by standards that satisfied *Giacco*, Stephen Schulhofer's conclusion in reference to Case 3 is surely right nonetheless: "Whatever the [real offense] policy specified, the resulting procedures will severely threaten the appearance of fairness and the constitutionality of the system."[99]

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[95] 382 U.S. 399 (1966).

[96] *Id.* at 405.

[97] *Id.*

[98] *See* note 91 *supra*.

The constitutional problems presented by Case 3 can be sidestepped by making Case 3 a special exception to the real offense guidelines, as was done by the United States and New York State parole guidelines.[100] However, that one small concession would not overcome the many other problems with real offense sentencing.

Each argument posed in section II could, by itself, raise serious doubts about real offense sentencing. Taken together, they demonstrate that enactment of the Model Act's sentencing provisions would be unwise, uninformed, inefficient, unfair, and possibly unconstitutional. Lord Hewart's admonition in *R v. Sussex Justices* applies: "it is not merely of some importance but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Real offense sentencing would look unjust, and be unjust.

III. OTHER CRITICISMS

Real offense sentencing aside, the Model Act has some strengths but even more weaknesses. This section outlines several of the major weaknesses. The treatment is brief, partly because the real offense problem is the primary focus of this essay, and partly because many of the points to be made were partially developed earlier. Although the Act purports to adopt "just deserts" as its overriding purpose of punishment, its application of that purpose is inconsistent and occasionally incoherent. The provisions intended to structure discretion and diminish disparity are unlikely to do so.

A. PURPOSES

The comments to the Model Act refer to just deserts as "the overriding philosophy,"[101] the "major factor,"[102] and the "philosophical basis,"[103] of the Model Act's sentencing provisions. General deterrence and incapacitation are given lesser roles. Broadly, the purposes describe a system of what, in Nigel Walker's analysis, might be called "limiting retributivism,"[104] and closely follow the proposed principles of sentencing in Norval Morris' *The Future of Imprisonment*.[105] An offender's punishment should not exceed that deserved "in relation to the seriousness of his offense."[106] Within the punitive upper limit, general deterrent and incapacitative considerations can play subsidiary roles. Finally, a principle of parsimony requires imposition of "the least severe measure necessary" and creates a presumption in favor of non-incarcerative sentences.[107]

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[99] Schulhofer, *supra* note 18, at 766.

[100] *See* note 58 *supra*.

[101] MODEL ACT, Prefatory Note, at 91.

[102] *Id.* at 89.

[103] *Id.* at 96.

Kantian moral philosophy, as transmuted into "just deserts" by Andrew von Hirsch and others, is a doctrine of *deserved* punishments. Parsimony is a utilitarian doctrine aimed at avoiding punishment not required for preventive purposes.[108] Von Hirsch recognizes this tension and therefore argues for equality in sentencing through the mechanism of relatively modest sanctions, consistently imposed.[109] The Model Act misperceives the connection. Although "inequalities in sentences that are unrelated to a purpose of this Article should be avoided,"[110] the exception is greater than the rule. If the "deserved" punishment is an upper limit and enforcement is activated by general deterrent, incapacitative, and other purposes, then the result is more nearly utilitarian than retributive. "Unequal" sentences will be the norm, not the exception. "Just deserts" is not the "overriding philosophy" of the Model Act. An eclectic utilitarianism holds that place.[111]

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[104] N. Walker, Sentencing in a Rational Society (1971).

[105] N. Morris, *supra* note 2, at 59-60.

[106] Model Act § 3-101(1). That equation is conventional, but curious. Kant's concept of the abstract obligation to punish evil in the exactly same kind (death for death, injury for injury, etc.) is impractical. See I. Kant, The Metaphysical Elements of Justice, at 99-108 (J. Ladd ed. 1965). For obvious epistemological reasons, no one can devise an objective "deserved" punishment for any conduct. The best substitute is a normative ranking of offense conduct, and a requirement that offenses with higher ranks, other things equal, receive more severe punishments than lower ranked offenses. The state criminal codes are not helpful. The newer codes based on the Model Penal Code divide felonies into 3 or 5 classes, but that small number of categories provides little guidance. The highest classes are reserved for truly serious crimes and the bulk of felonies are in the same one or two classes. The uncodified criminal laws, notably the federal law, contain hundreds of different combinations of sanctions for different offenses. The authorized sanctions for any particular offense are adventitious and provide no coherent basis for ranking offenses. As a result, most sophisticated guidelines have ranked offenses on the bases of exercises in which a group of people separately sort generic offenses into categories, identify the congruences, and compromise their differences. *See, e.g.*, D. Gottfredson, L. Wilkins, & P. Hoffman, Guidelines for Parole and Sentencing 69-80 (1978). Andrew von Hirsch recognized this problem and argued that the goal is to rank offenses and impose punishments that are scaled to the ranking. A. von Hirsch, *supra* note 2, at 76-83, 132-40. The Model Act seems to miss the problem. Optional § 3-112(b), for example, would authorize a sentencing commission to classify felonies into three classes if the criminal code does not already do so. If Class A is reserved for first degree murder, aggravated kidnapping, aggravated rape, and similar offenses, all other felonies must be grouped into classes B and C. It is not obvious why a sentencing commission would receive more guidance from that allocation than from a motley of unclassified felonies. Criminologists have wrestled with efforts to base notions of relative offense severity on public attitudes. *See, e.g.*, Sellin & Wolfgang, *Weighting Crime*, in 1 Crime and Justice, 167 (L. Radzinowicz & M. Wolfgang eds. 1971).

[107] Model Act § 3-102(3).

[108] On parsimony, see J. Bentham, Principles of Morals and Legislation Ch. XIII (1948).

[109] A. von Hirsch, *supra* note 2.

[110] Model Act § 3-102(2).

A law reform proposal premised on notions of deserved punishment should tie the defendant's punishment closely to the nature of his present offense, given the relevant present circumstances, broadly or narrowly defined. Yet the Model Act attaches overriding significance to the defendant's prior record, a matter that is wholly extrinsic to the moral character of his present act and the resulting calculation of deserved punishment.[112] If a previous offense earned a deserved punishment, that debt is paid. To punish a second offense more severely because of the prior offense offends the spirit (albeit not the constitutional requirements) of double jeopardy.

I am not suggesting that prior criminality can not sensibly be related to present punishment. Most utilitarian punishment philosophies would permit consideration of prior criminality. I suspect that most peoples' intuitive sense of justice would permit increased punishments for repeat offenders. However, a thoroughgoing retributivist would not do so,[113] and the Model Act's "philosophical basis" is purportedly "just deserts," the modern version of a thoroughgoing retributivism.

Prior convictions play an important part under the Model Act. Section 3-104 would permit doubled maximum sentences for "persistent offenders," defined (in section 3-105(a)) as a person who was twice previously convicted of a felony in the preceding five years at liberty. Prior convictions or "criminal behavior" also can be invoked as an aggravated circumstance to justify departures from guidelines.[114] Finally, and astonishingly, the Model Act's sample sentencing matrix shown in Table 2[115] would justify 1000 percent differences in sentence on the basis of "offender characteristics." The guideline sentence for a "9-10 point" armed robbery would vary between one and ten years, primarily on the basis of prior record factors. The difference is 2800 percent for a "7-8 point" armed robbery.

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[111] There are other inconsistencies in the Model Act. Only general deterrent considerations are said to be justifiable in sentencing. By contrast the comments stress that specific deterrence, "sentences based on deterring the particular offense involved," is forbidden. Comment to § 3-101(3)(i) at 97. Yet § 3-102(4)(iv) authorizes prison sentences when "measures less restrictive than confinement have frequently or recently been applied unsuccessfully." The threat to impose prison next time if the defendant fails to pay his fine or honor the conditions of probation may be necessary if those sanctions are to remain credible; still, no threat could be more precisely directed to a particular defendant. The Model Act's rejection of "predictive restraint" as a purpose of sentencing is chimerical. Comment to § 3-102(5). The comments reject basing sentences "on statistical or clinical judgments about a particular individual's future behavior: . . . unless based on prior criminal conduct." *Id.* at 101. The irony is that prior criminal record is at once both the best predictor of future criminality *and* subject to all of the problems of overprediction and false positives that led the Model Act's draftsmen to limit the role of incapacitation in sentencing. *See* MODEL ACT, at 92; Perlman & Stebbins, *supra* note 1, at 1196-97.

[112] Andrew von Hirsch has tried to justify sentence increases based on prior convictions in terms of a benefit of the doubt extended to first offenders which results in imposition of *less* than the deserved punishment. *See* A. VON HIRSCH, *supra* note 2, at 85; *cf.* G. FLETCHER, RETHINKING CRIMINAL LAW (1978). Whatever else may be said about von Hirsch's argument, as reified in the Model Act it is incompatible with rejection of specific deterrence as an allowable punishment purpose.

[113] *See* H. HART, PUNISHMENT AND RESPONSIBILITY (1968).

TABLE 2

SAMPLE MATRIX FOR ARMED ROBBERY

OFFENSE CHARACTERISTICS[a]	OFFENDER CHARACTERISTICS[b] −5 to −1	0 - 2	3 - 8	9 - 12	13 +
9-10	C[c] 1 year	C 2 years	C 4 years	C 6 years	C 10 years
7-8	Split C 90 days S[c] 2 years V[c] 6 mos.	C 1 year	C 3 years	C 4 years	C 7 years
5-6	Split C 90 days S 2 years V 6 mos.	C 90 days S 2 years V 1 year	C 1 year	C 3 years	C 6 years
3-4	S 2 years V 6 mos.	Split C 90 days S 1 year V 1 year	C 8 mos.	C 2 years	C 4 years
0-2	S 1 year V 6 mos.	S 2 years V 6 mos.	Split C 90 days S 1 year V 1 year	C 1 year	C 3 years

[a] Offense Characteristics:

Deadly weapon used	+10
Several victims	+ 4
Vulnerable victim	+ 4

[b] Offender Characteristics:

Prior violent offenses	+ 5 per off.
Prior felonies	+ 2 per off.
Prior revocations	+ 1 per viol.
Made restitution	− 1
Under 18 years of age	− 1

[c] Symbols: C = Continuous confinement; S = Supervision in community; V = Confinement for violation of conditions

Source: MODEL ACT, at 141

This "just deserts" statute offers a bit of everything except rehabilitation. Incapacitation, the engine that powers the Model Act's prior record machinery, will continue to be a goal of sentencing without regard to the purposes clauses of criminal codes. At least two comments to the Model Act acknowledge as much.[116] People who appear to be dangerous will be locked up and few of us as judges would do otherwise. General deterrence will probably continue to animate sentencing for a long time to come, and its implications are inconsistent with a principle of equality[117] in sentencing. Rehabilitation as a purpose of punishment appears to have caused more harm than good, and the Model Act, accordingly, would prohibit rehabilitative considerations from sentencing.[118]

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[114] MODEL ACT § 3-107.

[115] MODEL ACT, at 141.

Taken as a whole, then, the Model Act would establish a sentencing system in which retributive concerns establish an upper limit on permitted punishments: within that limit, retributive, incapacitative, and deterrent concerns, parsimoniously applied, can be considered in setting sentence. There is nothing disreputable about that mixture of punishment purposes. Other credible reform proposals have adopted it.[119] It is not, however, a "just deserts" mixture and it is unclear why the Model Act's draftsmen would claim that it is.

B. STRUCTURED DISCRETION

The usual rationale for determinate sentencing is that discretion must be structured if sentencing disparities are to be reduced. Unfortunately, the Model Act would not structure discretion very tightly. The statutory purposes of sentencing give little meaningful guidance to judges or members of a sentencing commission. The Act offers no guidance as to the form guidelines should take. Section 3-112 merely provides that the sentencing commission "shall adopt in a form determined by the commission sentencing guidelines as provided by this Act." The guidelines could thus take any form, from the verbal exhortations of the California Judicial Council's general guidelines[120] to the narrowly drafted sentencing matrix of the Minnesota Sentencing Guidelines Commission.[121] The Model Act grants substantial manipulative power to the prosecutor; he (and only he) may invoke the procedures calling for extended terms for "persistent offenders" and "especially aggravated offenses";[122] using a statutory presumption in favor of consecutive sentences,[123] he can determine sentence by his charging horizontal charge bargaining decisions; and he can allege the existence of aggravating circumstances that justify more severe sentences.[124] Appellate sentence appeal would ostensibly police judicial compliance with the guidelines. However the standard for appellate review is nebulous at best,[125] and the American experience with appellate sentence review provides little basis for a sanguine prediction that appellate sentence review would be rigorous.[126] Finally, while parole release indiscretions would be eliminated through the abolition of parole, a day-for-day good time system would give correctional administrators immense power to affect the durations of sentences.[127]

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[116] *Id.*, comment to § 3-105 (defining "persistent offenders"): "The essential link between offense and punishment is preserved (by authorizing extended terms for persistent offenders) while at the same time implementing *society's justified interest in extended punishment for multiple offenders*" *id.*, at 116 (emphasis added); comment to § 3-106 (defining "especially aggravated offense"): "The punishment deserved for the offense is enhanced as well as society's claim to incapacitation." *Id.* at 119.

[117] *Id.*, § 3-102(2) provides: "Inequalities in sentences that are unrelated to a purpose of this Article should be avoided." Almost any inequality could be "related to" deterrent, retributive, and incapacitative purposes making the equality exhortation a purely phatic proscription.

[118] *Id.*, § 3-102(5). The implications of rehabilitative considerations in sentencing are more complex than the Model Act's renunciation suggests. The problem with rehabilitation in sentencing was that prison sentences and indeterminate terms were justified on the basis of rehabilitative aims. That appears to have been unwise; hence the renunciation of rehabilitative sentencing. But, might not rehabilitative aims play a role when they argue *against* imprisonment? The classic cases are the defendant who can continue to receive drug treatment or psychological counselling only in the community and the youthful offender who may be hardened by prison experience and forever lost.

[119] *See, e.g.*, N. MORRIS, *supra* note 2.

The points outlined in Section III are fairly damaging. Nonetheless, they are subsidiary. However, taken together with the fundamental problems raised by real offense sentencing they suggest that states would be well advised not to adopt the Model Sentencing Act.

IV. NEXT STEPS

The draftsmen of the Model Act deserve credit for percipience and ambition: the former, for recognizing the practical prosecutorial problem presented by most prescriptive punishment programs; the latter, for trying vigorously to reflect that recognition in their reform regimen. Regrettably, the Model Act's real offense provisions are fundamenally misconceived. One interesting question is why so experienced a body as the Uniform Law Commissioners should have lapsed so badly in its corporate judgment. This final section offers a few speculative answers to that question and presents a thumbnail description of more promising sentencing reform ideas that might inform efforts to develop the next Model Sentencing Act. First, however, it may be appropriate to devote a few paragraphs to refutation of the argument that the Model Act's real offense proposals raise no problems not present in existing practices.

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[120] JUDICIAL COUNCIL OF CALIFORNIA, REPORT TO THE GOVERNOR AND THE LEGISLATURE—1978, SENTENCING RULES FOR THE SUPERIOR COURTS 7-31.

[121] MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE (1980).

[122] MODEL ACT § 3-207(e).

[123] *Id.* § 3-107.

[124] *Id.* § 3-109. This is especially so because the lists of allowable aggravating and mitigating factors in sentencing each end with "any other factor consistent with the purposes of this Article and the principles of sentencing." *Id.* §§ 3-108(12), 3-109(9).

[125] MODEL ACT § 3-208: "[the sentence imposed is] unduly disproportionate to sentences imposed for similar [real?] offenses on similar defendants or . . . does not serve the purposes of this Article and the principles of sentencing better than the sentence provided in the guidelines." *See* note 102 *supra*. *Compare* 1978 Minn. Laws, ch. 723; 244 MINN. STAT. § 11: "The supreme court may review whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact."

[126] *See, e.g.*, Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 AM. BAR FOUNDATION RESEARCH J. 881.

[127] MODEL ACT §§ 3-501, 4-502. Only one-fourth of accumulated good time would vest.

A. THE REVISIONIST RESPONSE

One response to the critique of real offense sentencing is that the Model Act's proposals contain little that is new. Most courts now operate on a real offense system; they simply don't admit to it. The objection has initial force. The offenses to which defendants plead guilty are often artifacts of plea bargaining. Under *Williams v. New York*,[128] courts are permitted to range widely in their consideration of evidence at sentencing hearings. That reality raises two questions: why is real offense sentencing now practiced, and does its ubiquity undercut the arguments against the Model Act's overt adoption of the practice?

Present practice results from three things: the generality of the definitions of some criminal offenses; the rehabilitative mystique that permeated American thinking about punishment during much of this century; and the absence from American systems of meaningful appellate sentence review.

The elements of offense definitions are generic. Standard definitions encompass conduct ranging from bank robberies by sub-machine gun to forcible takings of bicycles in schoolyards. Most people would want to distinguish between youthful bicycle thieves and professional armed robbers. Because the offense definitions often make no such distinctions, judges have become accustomed to looking behind the applicable conviction labels in order to reflect such distinctions in their sentencing decisions. Thus, the substantive law predisposes judges to real offense sentencing.

That predisposition was further encouraged by the prevalent rehabilitative ideology that suffused the criminal justice system during most of this century until the mid-seventies. If the causes of criminal conduct reside in inadequacies in the defendant and his environment, and if the solutions to these inadequacies involve efforts to rehabilitate him, what could be more natural than that the judge consider all possible information that might contribute to an accurate diagnosis of the defendant's failings and thereby inform the prescription for his reformation. *Williams v. New York*, for example, explicitly invokes rehabilitative punishment goals in justifying the decision that the sentencing hearing is not subject to the rules of evidence or to other constraints on the admissibility of evidence. Thus, if the generality of some offense definitions invited consideration of real offense conduct, rehabilitative concerns broadened the invitation.

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[128] 327 U.S. 241 (1949).

Finally, the absence of systems of meaningful appellate sentencing has meant that trials courts' sentencing practices have seldom been reviewed by higher courts. Little about sentencing criteria has been litigated or made the subject of appellate opinions. Once *Williams v. New York* let everything be considered at sentencing, there was no further opportunity for courts to consider whether, for example, a defendant convicted by a jury of theft although charged with armed robbery may later be sentenced as if he had been convicted of armed robbery.

Given that something like real offense sentencing is familiar practice in many courts, does that undermine the objections to the Model Sentencing Act's provisions? Probably not. The Model Act, indeed most sentencing reform efforts, represents an effort to bring greater fairness and predictability to sentencing. The comments to the Model Act make much of its commitment to "just deserts" and the realization of the goal that similarly situated defendants receive similar punishments. The Model Act's real offense proposals are animated by a concern that prosecutors will manipulate guidelines and thereby frustrate the normative values that are reified in the guidelines. These concerns for consistency and fairness are expressly invoked by the Model Act's draftsmen. The arguments presented here meet and reject the Model Act's real offense proposals on precisely those bases. The erratic and unprincipled nature of sentencing in many courts is a major cause of modern sentencing reform initiatives. The argument that something like real offense sentencing (though not under that name) is now common is not an argument for the Model Act's proposals, but against them. All of the objections apply equally to the unacknowledged systems of real offense sentencing that exist today in many jurisdictions.

B. THE PAST

The Model Act's fundamental failure appears to be the product of two factors. First, the United States Parole Commission's real offense parole guidelines were adopted, rather unreflectively, as a model for sentencing guidelines. Parole and sentencing are the business, respectively, of executive and judicial agencies, which perform quite distinct functions and present substantially different policy and constitutional implications. The equation of parole and sentencing appears to have been a mistake. The second debilitating factor was that the Model Act was premature. Determinate sentencing was too novel, its methods untried, and its ramifications insufficiently appreciated when the Model Act was drafted. Several hypotheses can be offered to explain why the Uniform Law Commission acted prematurely.

1. Parole and the primrose path

The Model Act's draftsmen seem to have been spellbound by the United States Parole Commission's real offense guidelines. The Model Act's comments do not discuss the practical, policy, and constitutional issues raised by real offense sentencing. They simply indicate that the real offense provisions are intended to minimize prosecutorial influence on sentencing. The constitutionality of real offense sentencing was simply assumed. At two places[129] the comments allude to constitutional implications and—in an impressive non-sequitur and without elaborating—cite *Billiteri v. United States Board of Parole*,[130] as if it assured the constitutionality of real offense sentencing. *Billeteri* upheld the United States Parole Commission's real offense guidelines. The Model Act's comments appear, through silence, to assume that what is constitutional and wise in parole release decision-making is necessarily constitutional and wise in sentencing. That, however, is not an inexorable equation. The nature and structural setting of parole release decision-making is fundamentally different from judicial sentencing in court.

The United States Parole Commission's parole release guidelines appear, on balance, to have been a social good. They created knowable criteria for parole release decisions. Their application is evening out the grosser disparities that result from having more than 500 federal district court judges imposing sentences. Release dates are now set on the basis of actual offense behavior and consistently applied offender variables, without regard for the sentence imposed (except when mandatory minimum sentences exceed the guideline release date or when the sentence expires before the release date). The specific offenses of which federal defendants are convicted are often artifacts of plea bargaining. Whether a defendant who committed an armed bank robbery will be convicted of armed robbery, robbery, theft, or something else is largely adventitious; it depends on local plea bargaining patterns. Where sentence bargaining is the norm, the defendant may plead guilty to armed robbery with knowledge that his sentence will not exceed x years.

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[129] Comments to the Model Act, at 144-45, 159-60.

[130] 541 F.2d 938 (2d Cir. 1976).

Where vertical charge bargaining is the norm, the defendant may plead guilty to robbery or theft. Where horizontal charge bargaining is the norm, the prosecutor may dismiss two armed robbery counts if the defendant pleads guilty to a third. It is difficult to imagine a philosophy of punishment in which the quantum of deserved or justified punishment depends on the prevalent pattern of plea bargaining in the court in which the defendant was convicted. By ignoring offenses of conviction and, to the extent legally possible, the prisoner's nominal sentence, the Parole Commission's guidelines probably tend to further the general aim that like prisoners be treated alike. The federal system lacks appellate sentence review and the Parole Commission is the only agency that can monitor sentences and ameliorate anomalies.

The Parole Commission has expressly rejected rehabilitative rationales for parole release decisions. Furthermore, since the variables in its guidelines system are known at, or shortly after, sentencing, the Commission has probably reduced prisoners' anxieties by its practice of setting presumptive release dates early in the sentence. A plausible argument can be made that, on balance, the parole guidelines have been for the good, even while acknowledging that the guidelines do pose significant policy problems.[131]

However, what is good for parole is not necessarily good for sentencing. Parole is an administrative decision, unconstrained by the rules of evidence or the criminal court's probative standard, and subject only to rudimentary requirements of procedural due process. Decisions are made in the first instance by parole hearing examiners. There are a small number of examiners and they are subject to formal and informal controls by the hierarchically organized Parole Commission. Both formal administrative controls and the examiners' career prospects conduce to a conscientious compliance with the parole guidelines. Decisions are made by two-person panels, thus reducing the likelihood of idiosyncratic decisions; the examiners have every incentive to follow the guidelines.

By contrast, as developed earlier,[132] any account of the courts that describes judges as the sole determiners of sentences is grossly oversimplified. Power configurations may vary from court to court and from jurisdiction to jurisdiction, but rarely is the judge free from the influence of others.

A second major structural difference between judges and parole examiners is that the judge's sentencing decision is seldom subject to appeal; when it is, the criteria for review are far from precise, and the likelihood of reversal is slight. The decision of the parole hearing examiners, by contrast, may be challenged through a succession of regional and national administrative appeals.[133]

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[131] *See, e.g.*, Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978).

[132] *See* text accompanying notes 65-72 *supra*.

A third structural difference is that the judge's sentencing decision is not subject to the same organizational controls as are the decisions of the parole examiners. Trial judges need not worry about being fired, or transferred, or not promoted, because they deviate from the guidelines. Those are all matters of concern to hearing examiners. In sum, parole hearing examiners and judges are more unalike than alike, and there should be no surprise that a decision tool should be appropriate for one and not the other.

There are, moreover, important differences between the decisions made by parole examiners and judges. Parole examiners decide how long a prisoner will serve before release. The judge first decides whether to sentence a defendant to prison and then for how long. These are different decisions and the guiding criteria for each may be different. The incarceration decision could, for example, be primarily deterrent, or retributive, even rehabilitative, while at the same time the duration decision might be based primarily on incapacitative concerns. By combining the two decisions into one set of guidelines, problems are raised for sentencing that are not raised under the parole guidelines.[134]

Parole release decisions are amenable to one set of guiding criteria set by a small collegial body. Under the United States Parole Commission's guidelines, those criteria have largely incapacitative aims. The aims could be otherwise but there would still be one set of criteria. By contrast, individual sentencing decisions involve the views and needs of individual judges and prosecutors subject to the particular dynamics of particular courtrooms.

Further, because the parole guidelines are primarily incapacitative, they can plausibly permit large differences in release dates for people who committed the same "real" offense. The offender characteristics that predict recidivism provide a basis for justifying different release dates. Sentencing, however, is increasingly perceived as a decision in which retributive and deterrent considerations should guide decision-making. Neither rationale is likely to justify dramatic differences in sentences on the basis of the offenders' personal characteristics. Yet use of an incapacitative parole guideline model may produce that result.

The last adverse consequence of use of the parole guideline model for sentencing is that it suggests that sentencing can be mechanized into a process in which a few well-defined factors determine results. To the contrary, sentencing is a matter of high drama, rich and complex, and pregnant with moral and ethical content. Sentencing should be the product of informed, compassionate human judgment, not the result of ministerial tabulations of characteristics and calculations of point totals.

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[133] U.S. Parole Commission Rules, 28 C.F.R. §§ 2.24-2.27 (1980).

[134] For example, how to induce guilty pleas.

For all these reasons, parole decision-making is fundamentally different from sentencing. Accordingly, the *Billiteri* decision, upholding the use of real offense considerations in parole guidelines, does not mean that courts should or would uphold a comparable approach to sentencing guidelines.

2. *Too much too soon*

The model laws developed by the Uniform Law Commissioners are variously successful in gaining enactment, but few are embarassments. They may be too bold and ambitious. They may be on subjects that do not inspire legislators. But they are usually drafted and quarreled over by lawyers who are experts in the area of the law under consideration and they usually show that influence.

The mistake here may have been to include a sentencing section in the Model Act. The matters of correctional policy and organization that concern the Model Act's other five Articles were ripe. The sentencing issues were not. Thus, the speculations that follow do not apply to the entire Model Act but only to Article 3 on sentencing.

The primary reporters for the Model Act have written: "[T]he major policy decisions which serve as the foundations for the provisions of the Act . . . were based on the perceptions of the 'state of the art' of corrections initially held by the authors. . . ."[135] Regrettably, the state of the sentencing reform art was primitive in 1974, when development of the Model Act began, and was still primitive in April 1978 when the drafting committee held its last meeting. By 1978, only a handful of states had passed determinate sentencing laws, and no one knew how they would work. It is now clear that those early laws were badly misconceived. The California law encouraged prosecutorial manipulation. The Maine, Indiana, and Illinois laws abolished parole but gave no meaningful guidance to judicial sentencing decisions. During most of the period of the drafting committee's work, the sentencing reform literature consisted largely of exhortations.[136] The efforts to work out details were few in number and the exhortations, while immensely useful in moving us forward, were underdeveloped.[137] Thus, while model and uniform laws usually pull together the most advanced and sophisticated thinking on a subject, synthesizing practical experience with various existing approaches, and promising new approaches to a problem, there were no useful sentencing reform experiences and no legacy of law and lore on which the Model Act's draftsmen could draw.

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[135] Perlman & Potuto, *supra* note 1, at 928.

[136] *See, e.g.*, M. FRANKEL, *supra* note 2; N. MORRIS, *supra* note 2.

The second problem is that there were no experts. As there were few enacted determinate sentencing laws, and no useful indications of how they would work or whether they would realize their proponents' aims, there could be no experts. When the Uniform Law Commissioners consider a model law on a common law subject, on a commercial or business law subject, even on a criminal law or criminal procedure subject, experts are available, and they are used. Talented lawyers who work day-to-day in a particular field know the problems they face and can make well-informed guesses about the implications of proposals for change. There simply were no equivalent experts on sentencing reform in 1975-78. Moreover, neither the Model Act's drafting committee, nor its review committee, nor its staff or consultants included a single person of national prominence in sentencing reform. And in those early days even national prominence could seldom mean expertise. The issues were not ripe and that almost necessarily meant that there were no trained gardeners to tend them.

Finally, the cornucopia of federal money for crime-related research and projects may have disserved the Uniform Law Commissioners. LEAA was then required to spend enormous amounts of money annually and the Uniform Law Commissioners could not have been a safer, more establishmentarian institution to which to give it. The money was probably available, the Uniform Law Commissioners were a safe grantee, and the idea of a Model Sentencing Act was not inherently implausible. Once the money was asked for and received, there could be no choice but to proceed.

Someday, presumably, there will be a second edition of the Model Sentencing and Corrections Act. The following subsection gives a few general suggestions that offer some promise for the reduction of sentencing disparities and the achievement of a system of principled and reasonably evenhanded sanctions.

C. THE FUTURE: AGENDA FOR A SECOND EDITION

The second edition of the Model Sentencing and Corrections Act should chart a straighter path to just sentencing. The goals should be unchanged—reduce unwarranted disparities; create a presumption against imprisonment that can be overcome only by the demonstrated requirements of retribution, general deterrence, and incapacitation; and limit the role of rehabilitation as a sentencing rationale. Even the basic structure of the Act should be unchanged. A sentencing commission (full-time rather than part-time) could be established to develop general criteria for sentencing. Appellate sentence review should be established on the basis of an unambiguous review standard, albeit without prosecutorial appeals or the prospect of sentence *increases* on appeal. Parole release should remain abolished. A good time system should be maintained, but good time credits should "vest." These points, however, are peripheral. They involve relatively crude efforts to police the key decisions of judges, prosecutors, and defense counsel.

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[137] *See, e.g.*, TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *supra* note 2; A. VON HIRSCH, *supra* note 2.

The critical features of realistic sentencing reform are these:

1. Narrow the continuum of sentencing choices

When judges are able to choose sentences ranging from probation to 25 years, they will do so. At a stroke, sentencing disparities could be dramatically reduced by reducing maximum sentences for classes of felonies from the conventional life (death) -25 years-12 years-6 years-3 years established by state criminal codes to, say, life (death) -8 years-4 years-2 years-1 year. Sentence durations could be shortened openly or by subterfuge. Open action is preferable and has been recommended by major national commissions in Canada and England.[138] Wide sentencing frames were enacted in the era of indeterminate sentences and, in a sense, could be discounted by the likelihood of parole. With the demise of parole, the justification disappears and the certain injustice of anomalous, unduly long sentences remains. A Model Act should be forward-looking. There may be political difficulties to be overcome in reducing sentence maximums by, say, two-thirds, but the draftsmen of a model for reform legislation should be guided by their collective wisdom and best judgment, not by their worst fears of political posturing.

However, if caution counsels subterfuge, several courses are available. The Study Draft of the National Commission on Reform of Federal Crimnal Laws, for instance, artfully camouflaged its drastically reduced sentence maximums.[139] Table 3 below shows the Study Draft's nominal and actual maximum prison sentences.

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[138] Advisory Council on the Penal System, Sentences of Imprisonment—A Review of Maximum Penalties, 77-88, 147-64 (1978); Law Reform Commission of Canada, Imprisonment and Release, 21-22 (1975).

[139] Nat'l Comm'n on Reform of Federal Criminal Laws, Study Draft §§ 3201-02 (1970).

TABLE 3

NOMINAL AND ACTUAL MAXIMUM SENTENCES

FELONY CLASS*	NOMINAL	ACTUAL WITHOUT SPECIAL FINDING	ACTUAL WITH SPECIAL FINDING
A	30 years	15 years	25 years
B	15 years	4 years	12 years
C	7 years	3 years	5 years

* The vast majority of felonies, and felons, would fall within Felony classes B and C and thus, ordinarily, be subject to terms of incarceration not longer than 3 or 4 years. An enormous amount of sentencing disparity would disappear.

The Study Draft also envisioned parole release eligibility at no later than one-third of the maximum sentence. The Commission accomplished its legerdemain by including a mandatory parole term *within* the maximum sentence (5 years, 3 years, 2 years, respectively), and by requiring a special finding that the defendant "presents an exceptional risk to the safety of the public"[140] before an especially long sentence could be imposed. The Study Draft contains much wit and not a little wisdom. The special-finding requirements are, in effect, a set of guidelines for sentencing and could be incorporated into a statutory framework of much shorter maximums.

Another simple subterfuge would be to adopt sentence maximums that include a large proportion of vesting good time. The Model Act recommends day-for-day good time but only part of that would vest. The effect is to cut the sentence maximums in half for well-behaved prisoners. This approach to shortening sentences, regardless of whether the good time vests is little more than a public relations gimmick. However, if good time does not vest, the potential for abuse is enormous. If, for example, a ten year sentence meant, in effect, five years in prison and five years good time, then in a non-vesting system correctional administrators would have power to deprive a prisoner of five years of liberty, subject only to rudimentary procedural requirements. Abuse and anomalies would be inevitable. In any event, so severe a deprivation should result only from conviction for a new criminal offense following a conventional prosecution.

2. *Incapacitate imprisonment*

Among the grossest sentencing injustices are those which befall the defendants who receive prison sentences after convictions for offenses that seldom result in prison sentences. The decision whether to imprison an offender is the most crucial punishment choice. Where experience tells us that imprisonment is seldom ordered, and then for reasons that are, overall, inexplicable,[141] the sentence inevitably is more of a comment on the idiosyncrasies of the judge rather than a comment on the culpability of the offender. The solution: create a statutory sentencing structure in which prison sentences are reserved only for truly serious criminality, perhaps with the statutory possibility of imprisonment for lesser offenses *only* after the defendant has received, say, five prior convictions.

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[140] The "exceptional risk" finding authority was not open-ended, but was limited to three closely defined situations: the defendant must have been a "persistent felony offender," a "professional criminal," or a "dangerous, mentally abnormal offender." *Id.* at § 3202(3)-(5).

3. *Structure plea bargaining*

The Model Act's real offense proposal, for all its infirmities, was an indirect effort to prevent prosecutorial manipulation of sentencing guidelines. The more promising approach to redress prosecutorial inconsistency is from the front. Estimable bodies have long called for development of administrative rules for prosecutorial charging, plea bargaining, and sentencing decisions.[142] Some prosecutors' offices have developed and implemented such regulations.[143] Others have "abolished" plea bargaining: in Alaska the abolition seems to have been a success; the incidence of plea bargains was greatly reduced, defendants continued to plead guilty, the courts were not inundated by trials, and case processing time did not increase.[144] The next Model Act should approach the problem of constraining prosecutorial decision-making head-on, working out the details of a model set of prosecutorial guidelines.

The Model Act was a good idea that misfired. We have learned much since it was drafted, however, and the second edition, should there ever be one, will have much more substantial experience on which to draw. This first Model Act should be abandoned. Its flaws can be redressed only by starting over. Still, it may well turn out that it will have played a useful role by showing us how not to go about the complex business of sentencing reform.

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[141] Less than half of federal defendants convicted of fraud and embezzlement, for example, receive prison sentences. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1979, Table 5-30. One recent study concluded that regression analyses can explain only 7.5 percent of the variance in sentences received by federal defendants convicted of embezzlement. L. SUTTON, VARIATIONS IN FEDERAL CRIMINAL SENTENCES: A STATISTICAL ASSESSMENT AT THE NATIONAL LEVEL (1978).

[142] PRESIDENT'S COMM'N LAW ENFORCEMENT & ADMINISTRATION OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 133-34 (1967); AMERICAN BAR ASSOCIATION STANDARDS, THE PROSECUTION FUNCTION § 2.5 (1971); NAT'L ADVISORY COMM'N ON CRIMINAL JUST. STANDARDS & GOALS, COURTS, Standards 13.3 (1973).

[143] *See, e.g.*, Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L.BULL. 48 (1975); Kuh, *Sentencing Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975).

[144] ALASKA, note 20 *supra*.

WHAT CHANGES ARE MOST NEEDED IN THE PROCEDURES USED IN THE UNITED STATES JUSTICE SYSTEM?

An Annotated Bibliography on the 1983-1984 National High School Debate Topic

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INTRODUCTION

This annotated bibliography is composed of selected periodical articles and books. The majority of the citations were obtained from the computerized Congressional Research Service Bibliographic Data Base, created and maintained by the Library Services Division, and from the Library of Congress Computerized Catalog. The Index to Legal Periodicals and Public Affairs Information Service Index were also used to assure broad coverage of the subject areas.

It should be noted that, while this bibliography was chosen to reflect an over-all balance on the debate topic, any specific entry may present a particular point of view. Therefore, the user is responsible for determining the objectivity of each item.

The authors wish to credit John M. White for the secretarial production of this bibliography.

Selected items in this bibliography are reproduced in the foregoing pages. Others may be located at a nearby public, research, or depository library. The Congressional Research Service cannot provide debaters copies of the items listed.

I. GENERAL

American Bar Association. Judicial Administration Division. Committee on Implementation of Standards of Judicial Administration. The ABA model judicial article. State court journal, v. 3, winter 1979: 8-16, 42-43.

"The model article is designed to be used as a guide in any jurisdiction considering changes in the court system. . . . The new article recognizes the trend toward a single-level trial court by providing for a unified, one-tier trial court with a single class of judges. The previous article provided for a two-tier trial court with a general jurisdiction court and an inferior level trial court presided over by magistrates."

American Bar Association. Pound Conference Follow-Up Task Force. Report. [Chicago] 1976. 45 p.

Addresses problems of the American justice system confronting the practicing bar and suggests a program of action which the American Bar Association may embrace to correct these problems. Proposals include the establishment of neighborhood justice centers utilizing such methods as arbitration, mediation, and referral to small claims courts and courts of general jurisdiction; decriminalization of some "victimless" crimes; and establishment of a Federal office for the collection of data relevant to judicial administration and dispute resolution.

American justice: ABC's of how it really works. U.S. news & world report, v. 93, Nov. 1, 1982: 35-58.

Series of articles examines the operation of the justice system. Includes sections on the courts, police, juries, prisons, lawsuits, the influence of lawyers, and the role of the Supreme Court.

Ball, Howard. Courts and politics: the Federal judicial system Englewood Cliffs, N.J., Prentice-Hall, c1980. 303 p.

Discusses the functions of the courts in the democratic political system; considers the structure and dynamics of the judicial process; and describes the politics of the judicial process in the Federal system.

Berkson, Larry C. The emerging ideal of court unification. Judicature, v. 60, Mar. 1977: 373-382.

Discusses the five elements of the court unification concept, which are: "structural consolidation and simplification, centralized rule-making, centralized management, centralized budgeting and state financing."

Bradley, Tom. A court system in which all the people have a part. Judicature, v. 58, Jan. 1975: 270-275.

The mayor of Los Angeles discusses barriers to full citizen participation in government and the court system, citing court watching programs, studies of court systems, and innovative projects by townspeople as examples of efforts to open up the court system.

Burger, Warren E. Annual report on the state of the judiciary. American Bar Association journal, v. 69, Apr. 1983: 442-447.

Address presented "to the midyear meeting of the American Bar Association in New Orleans on February 6, 1983. . . . Chief Justice Burger calls on Congress to establish a temporary, special panel to resolve intercircuit conflicts and a tripartite commission to study long-range solutions for managing the Supreme Court's caseload."

See also: Meador, Daniel J. A comment on the Chief Justice's proposals. American Bar Association journal, v. 69, Apr. 1983: 448-450. Professor of law comments that the chief justice's proposals hold potential for significant accomplishment."

----- Is our jury system working? Reader's digest, v. 118, Feb. 1981: 126-130.
"Trial by jury in far too many places is a trial for jurors--a system plagued by lost time, lost dollars and lost pride in a precious heritage. But the system can be saved, argues the Chief Justice, who cites important changes that are already proving their worth."

----- Unclogging the courts--Chief Justice speaks out: interview with Warren E. Burger. U.S. news & world report, v. 92, Feb. 22, 1982: 36-40.
In an interview, U.S. Supreme Court Chief Justice Burger discusses a wide range of topics, including court congestion and delay, prison conditions, lawyers and litigation, and media coverage of the courts.

Carbon, Susan, Larry Berkson, and Judy Rosenbaum. Court reform in the twentieth century: a critique of the court unification controversy. Emory law journal, v. 27, summer 1978: 559-607.
Article concludes "that the unified model is a useful and rational means of state court organization and management. Perhaps the most attractive feature of the concept is that it makes one official or group of officials responsible for administering the entire state judiciary. The absence of this important element appears to be the primary reason why many court 'systems' have degenerated into such archaic institutions."

Church, Thomas, Jr., and others. Justice delayed. Williamsburg, Va., National Center for State Courts [1978] 105 p.
"This study examines the pace of civil and criminal litigation in state trial courts of general jurisdiction. The major goals are to provide a national context for the concept of 'delay' to determine why cases move faster in some courts than in others and to evaluate the most promising remedies for expediting litigation. . . . Problems of civil and criminal court delay are remarkably similar, as are factors related to delay. Traditional explanations of delay are tested in this study and found wanting. Major delay reduction strategies will be examined in light of these findings."

Clark, J. Morris. Civil and criminal penalties and forfeitures: a framework for constitutional analysis. Minnesota law review, v. 60, Feb. 1976: 379-500.
Article "sorts out descriptively what the Supreme Court does in applying the Constitution to penalties that are not labeled 'criminal,' and to provide some sort of analytical framework that might make decisions in this area more predictable, consistent, and articulate." Includes detailed discussions of punishment, the civil-criminal distinction, constitutional aspects of civil punishment, and legislative "purpose."

Clark, Ramsey. Crime in America; observations on its nature, causes, prevention, and control. New York, Simon and Schuster, 1970. 346 p.

Cooke, Lawrence H. Waste not, wait not--a consideration of Federal and State jurisdiction. Fordham law review, v. 49, May 1981: 895-903.
Chief Judge of New York State gives an historical overview of Federal and State court jurisdictions. In light of a "litigation explosion," he suggests "if we allot spheres of jurisdiction in such a way as to avoid overlap and to free judicial components from repetition of effort, then we will not squander our judicial substance, and delay in the delivery of justice will be reduced to a minimum."

Council of State Governments. Judicial planning in the States. Lexington, Ky. [1976] 134 p. (Council of State Governments. RM-599)
Partial contents.--Definition of judicial planning.--Administration and planning of State judicial systems.--Institutionalization of judicial planning.--Judicial planning in the States: findings and analysis of the 1976 national survey.--State-by-State descriptions of the status of planning.

Court delay: diagnosing the problem, testing new treatments. Judicature, v. 65, Aug. 1981: whole issue.

Partial contents.--Analyzing court delay-reduction programs: why do some succeed? by J. Ryan and others.--Who sets the pace of litigation in urban trial courts? by T. Church, Jr.--Measuring the pace of civil litigation in Federal and State trial courts, by J. Grossman and others.

Courts, law and judicial process. New York, Free Press, 1981. 564 p.

Partial contents.--The organization of American courts in the United States, by H. Jacob.--The nature of law, by H. Abraham.--The general preventive effects of punishments, by J. Andenaes.--Does punishment deter crime? by W. Chambliss.--Social policy and judicial capacity, by D. Horowitz. --Police behavior: gradations in law enforcement, by J. Goldstein.--Police justice, by A. Reiss.--Prosecutorial discretion, by W. Pizzi.--Should there be affirmative action for the judiciary? by S. Goldman.--Political orientations, social backgrounds, and role perceptions of State supreme court judges, by J. Wold.--The limits to scientific jury selection, by M. Saks.--Government by judiciary, by R. Berger.--Accountability of judges, by D. Adamany and P. Dubois.--Supreme Court support for Black litigants: a comparison of the Warren and Burger courts, by S. Ulmer and M. Thomson.--Criminal justice in the Federal courts, by S. Goldman.--A study of the Supreme Court's caseload, by G. Casper and R. Posner.--Judicial rules and caseload, by L. Friedman.

Crime. Wilson quarterly, v. 7, spring 1983: 102-141.

Three essays from the forthcoming Crime and Public Policy (to be published in May 1983 by the Institute for Contemporary Studies, San Francisco) focus "on crime trends and types of offenders, on the criminal justice system, and on the relationship of crime to family life."

Crime and justice in America: 1776-1976. Philadelphia, American Academy of Political and Social Science, 1976. 161 p. (Annals, v. 423, Jan. 1976)

Partial contents.--Criminal violence in America: the first hundred years, by R. Lane.--The great American search: causes of crime, 1876-1976, by T. Hirschi and D. Rudisill.--Blacks, crime and American culture, by J. Davis.--Progress and prosecution, by J. Kress.--Criminal sentencing in the United States: an historical and conceptual overview, by A. Dershowitz.

Dill, Forrest. Criminal justice: the local tradition. New York affairs, v. 5, no. 2, 1978: 198-205.

Discusses the administration of criminal justice in the New York metropolitan area and in the Northeast. "Criminal justice in . . . this region is organized, financed, and operated in the same way it is throughout the country. Here, as in other metropolitan regions, the arena of criminal justice is a network of intergovernmental relations."

Federal regulation of firearms; a report prepared for the use of the Committee on the Judiciary, United States Senate. Washington, G.P.O., 1982. 267 p.

At head of title: 97th Cong., 2nd sess. Committee print.

This report which was prepared by the Congressional Research Service of the Library of Congress "provides a general review of gun regulation as a Federal issue, and also covers existing Federal and State laws, a comparative analysis of major bills . . . pending before the Congress, recent research of the crime-gun relationship, and public opinion of gun regulation.

Fleming, Macklin. The law's delay: the dragon slain Friday breathes fire again Monday. Public interest, no. 32, summer 1973: 18-33.

Discusses what causes court delay and what can be done to remedy the situation.

Foster, Jack D., and others. The future of criminal justice planning. Lexington, Ky., Council of State Governments [1976] 42 p.

"Intent of this report is to clarify the issues that should be addressed by a State when considering its role in improving the quality of policy, program, and resource allocation decisions for its entire criminal justice system apart from a federal grant-in-aid program."

Friedman, Lawrence M., and others. State supreme courts: a century of style and citation. Stanford law review, v. 33, May 1981: 773-818.

Article analyzes "changes in American court opinions . . . based on a sample of 5,900 cases from 16 state supreme courts from 1870 to 1970. . . . Presents findings about opinion length, dissents and concurrences, and citation patterns . . . and also explores interstate differences, to shed some light on the possible determinants of changes over time."

Glick, Henry Robert. State court organization. Current history, v. 70, June 1976: 253-256, 271.

"State courts affect the overall impact of public policy through the cumulative effects of their decisions in everyday or seemingly routine cases. . . . Decisions in a set or series of similar cases may determine the patterns of court rulings that affect important parts of American life."

Good, Dale W. Court reform: do critics understand the issues? Judicature, v. 63, Mar. 1980: 364-375.

Argues that "by treating court reform as if it were a universal prescription, critics are overlooking the significant achievements of specific reforms in specific contexts."

Hays, Steven W. The logic of court reform: is Frederick Taylor gloating? Criminal justice review, v. 4, fall 1979: 7-16.

"Evaluate[s] the central tenets of court reform in terms of contemporary public administration literature and suggest[s] alternative reform strategies that are more compatible with the political and administrative exigencies of the judicial environment."

Howard, A.E. Dick. A litigation society? Wilson quarterly, v. 5, summer 1981: 98-109.

"Howard, a specialist on constitutional law, suggests, we may be well on our way to becoming a 'litigation society.' The courts have often served as a useful 'safety valve'--they led the way in ending de jure racial segregation. But, of late, they have tried to resolve an increasing number of social questions that are less susceptible to judicial remedy. The real difficulty, Howard says, may be the breakdown of the old sense of community and compromise that led Americans to settle political disputes out of court--in legislatures and party conventions."

Improving the criminal justice system in the United States; selected excerpts and references relating to the national debate topics for high schools, 1976-1977. Washington, G.P.O., 1976. 424 p. (Document, Senate, 97th Congress, 2nd session, no. 94-171)

Prepared by the Congressional Research Service of the Library of Congress.

Partial contents.--Resolved, that a comprehensive program of penal reform should be adopted throughout the United States.--Resolved, that a uniform code of pre-trial procedures and penalties for all felonies should be established throughout the United States.--Resolved, that a comprehensive program of compulsory gun control should be established throughout the United States.

Jacob, Herbert. Justice in America; courts, lawyers, and the judicial process. 3d ed. Boston, Little, Brown, c1978. 247 p.

Examines "individual facets of American judicial institutions and practices and observe[s] the manner in which legal traditions interact with political processes."

Johnson, Emily, and Marjorie Kravitz. Basic sources in criminal justice: a selected bibliography. Washington [National Institute of Law Enforcement and Criminal Justice] for sale by the Supt. of Docs., G.P.O., 1978. 182 p.

Partial contents.--Commission reports.--Criminology.--Law enforcement.--Courts.--Corrections.--Juvenile justice and juvenile delinquency.--Directories and other information sources.

Justice in America. New York, H.W. Wilson Co., 1972. 232 p. (The Reference shelf, v. 44, no. 1)

Series of essays on civil and criminal justice.

Partial contents.--Origins and development of American law enforcement, by V. Peterson.--The roots of lawlessness, by H. Commager.--Justice on the verge of collapse, by J. Main.--The courtroom as circus, by L. Nizer.--Innocence presumed or innocence denied? by R. Clark.--How Mexican-Americans view the law, by E. Lopez.--Victims of crime: the forgotten people, by T. Sendak.--Development of judicial reform efforts, by R. Deans.--Major steps that need to be taken, by W. Burger.--Bibliography.

Kastenmeier, Robert W., and Michael J. Remington. Court reform and access to justice: a legislative perspective. Harvard journal on legislation, v. 16, spring 1979: 301-342.

"Responding to the increasing caseload of the courts, members of the judicial branch and the bar have dominated the discussion of reforms designed to facilitate the proper functioning of the nation's judicial system. In this article . . . authors present a view from the legislative branch of the essential elements of judicial reform. Arguing that expeditious resolution of disputes is central to the right of access to justice, the authors survey the major legislative proposals before the Ninety-sixth Congress and offer their suggestions for improving the delivery of justice."

Klein, Fannie J. Federal and State court systems: a guide. Cambridge, Mass., Published for the Institute of Judicial Administration by Ballinger Pub. Co., c1977. 303 p.

This book examines such issues as the dual court system, State court operation and jurisdiction, Federal court operation, and grand and petit juries. It includes a section on legal research tools which focuses on State court materials, by E.J. Bander, and a section by J.P. Richert comparing Federal and State courts.

Kleps, Ralph N. Can State courts receive Federal help without Federal control? Judicature, v. 62, Mar. 1979: 370-371, 412-413.

Former director of California's Administrative Office of the Courts uses examples from LEAA (Law Enforcement Assistance Administration) programs to present his concerns about potential threats to separation of powers based on the receipt of Federal aid by State courts. Notes that some of the problems with the receipt of Federal money include the dispersal of funds within the Federal fiscal year framework and the fact that monies for the courts are channeled through State executive branch agencies without regard for the separation of the courts from the executive branch.

Lando, Ole. The contribution of comparative law to law reform by international organizations. American journal of comparative law, v. 25, fall 1977: 641-657.

International law reform is growing rapidly in volume and importance. The writer focuses on four international organizations engaged in preparation and drafting of uniform law.

Leiser, Burton M. Liberty, justice, and morals: contemporary value conflicts. 2nd ed. New York, Macmillan, 1979. 463 p.

"In this book some of the major areas of conflict [between liberty and law] in the contemporary world are examined in an attempt to determine how they might be resolved while preserving personal liberties, without giving up our society's moral standards, and without abandoning either our legal system or the principles of justice upon which it is founded."

Lewis, Merlin, Warren Bundy, and James L. Hague. An introduction to the courts and judicial process. Englewood Cliffs, N.J., Prentice-Hall, c1978. 327 p.

Mayers, Lewis. The American legal system; the administration of justice in the United States by judicial, administrative, military, and arbitral tribunals. Rev. ed. New York, Harper & Row, 1964. 594 p.

Contents.--The courts.--Administrative tribunals and their superivision by the courts.--Military tribunals and their control by the courts.--Voluntary tribunals and their control by the courts.

McConkie, Stanford S. Decision-making in State supreme courts. Judicature, v. 59, Feb. 1976: 337-343.
Reviews the decision-making process of State supreme courts and reveals that the single most notable factor is the wide diversity of their operations.

McConnell, Edward B. The National Center for State Courts: a progress report. Judicature, v. 60, June-July 1976: 39-42.
Director of the National Center for State Courts reports on that agency's accomplishments during the five years from its inception to the present. Discusses various projects presently underway, including a plan for reorganization of small claims courts, regional workshops to improve rural courts, and plans to provide information on new equipment and court-related technology.

McLauchlan, William P. American legal processes. New York, Wiley, c1977. 218 p. (Viewpoints on American politics)
This book discusses access to the courts, describes the operation of the civil and criminal courts in this country, examines specific problems associated with local courts, and presents information on the appellate court system.

Morris, Jeffrey Brandon. The changing Federal courts. In The Power to govern: assessing reform in the United States. New York, Academy of Political Science, 1981. (Proceedings, v. 34, no. 2, 1981) p. 90-113.
Challenges today's Federal judicial system "to meet increased demands on the federal courts, without doing violence to a system that can command a vast reservoir of support, to make changes in rules to achieve fairness and simplicity, to increase staffing while minimizing the effects of bureaucratization, and to achieve more effective management while preserving independence."

Nagel, Stuart S. Improving the legal process: effects of alternatives. Lexington, Mass., Lexington Books [1975] 394 p.

National Center for State Courts. Planning in State courts: a survey of the state of the art. [Denver] 1976. 55 p. (Publication no. R0029)
"This monograph describes some basic elements of strategic planning, reviews previous court planning experiences, and suggests some factors that may indicate effective court planning. . . . These factors include procedural indicators, such as a written plan and a planning staff, and several substantive indicators, such as expeditious and quality judicial dispute resolution."

----- Planning in State courts: trends and developments 1976-1978. Washington, c1978. 48 p. (Publication no. R0040)
"This is the second in a series of monographs on the subject of state court planning by the Court Planning Capabilities Project of the National Center for State Courts. . . . This second monograph deals with developments since July 1976, and highlights the effect on court planning of the Crime Control Act of 1976 (Public Law 94-503). It also addresses the prospects for effective court planning."

----- State court caseload statistics: annual report, 1976. Williamsburg, Va., 1980. 411 p. (National court statistics project no. R-0052)

National Conference of State Criminal Justice Planning Administrators. State of the States on crime and justice. [Washington] 1976. 77 p.
"This report provides a careful, balanced view of the . . . [Federal assistance program under the Safe Streets Act] its progress as well as its problems--from the perspective of the 55 States and territories which have primary responsibility for implementing the program."

National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (1976 : St. Paul, Minn.) The Pound conference: perspectives on justice in the future; proceedings. St. Paul, West Pub. Co., 1979. 377 p.
This conference was sponsored by the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States.

National Conference on the Judiciary (2nd : 1978 : Williamsburg, Va.) State courts: a blueprint for the future; proceedings. [Williamsburg] National Center for State Courts, 1978. 335 p.

This conference addressed such issues as the public image of the courts, the role of the courts in the community, the role of the courts in the American system of government and models for court improvement.

National Court Statistics Project (U.S.). State court caseload statistics: the state of the art. Washington, U.S. Dept. of Justice, National Criminal Justice Information and Statistics Service, for sale by the Supt. of Docs., G.P.O., 1978. 221 p.

O'Connor, Sandra D. Trends in the relationship between the Federal and State courts from the perspective of a State court judge. William and Mary law review, v. 22, summer 1981: 801-819.

Arizona appellate judge examines recent trends in the application of Federal constitutional law to State criminal and civil proceedings, holding that "it is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court." Since publication of this article, the author has become a U.S. Supreme Court justice.

Olson, Susan M. Judicial impact statements for State legislation: why so little interest? Judicature, v. 66, Sept.-Oct. 1982: 147-150.

Considers why judicial impact statements have not taken hold at the State level and considers the future of such statements.

Petrowitz, Harold C. Federal court reform: the Federal Courts Improvement Act of 1982--and beyond. American University law review, v. 32, winter 1983: 543-566.

Article examines changes implemented by the Act.

The Politics of local justice. Boston, Little, Brown, 1970. 255 p.

Powell, Lewis F., Jr. Reforms--long overdue. Record of the Association of the Bar of the City of New York, v. 33, Nov. 1978: 458-467.

Supreme Court justice discusses the need for reform in the courts. He looks at problems, including the caseload, which are confronting the courts, and discusses the responsibility of the Bar to develop new solutions to problems within the judicial system.

Prisoners in America. Englewood Cliffs, N.J., Prentice Hall, 1973.

"Background reading for the forty-second American Assembly, held Dec. 1972, at Arden House, Harriman, N.Y."

Partial contents.--Juvenile justice reform: diversion, due process, and deinstitutionalization, by L. Empey.--Jails and criminal justice, by E. Flynn.--Correction of adult offenders in the community, by D. Glaser.--Adult felons in prison, by D. Cressey.--Early diversion from the criminal justice system: practice in search of a theory, by E. Vorenberg and J. Vorenberg.--Evaluative research for corrections, by D. Ward.

Radzinowicz, Leon, Sir, and Roger Hood. Incapacitating the habitual criminal: the English experience. Michigan law review, v. 78, Aug. 1980: 1305-1389.

"Article examines the broader policy questions common to habitual offender programs in both the United States and Great Britain. It describes the tension between liberal tradition and the state's desire to incapacitate those who repeatedly threaten life or property."

Reducing court delay. Washington, For sale by the Supt. of Docs., G.P.O., 1973. 116 p.

"This publication is one of a series of nine monographs extracted from the Proceedings of the Fourth National Symposium on Law Enforcement Science and Technology."

Partial contents.--Court delay, crime control, and neglect of the interests of witnesses, by M. Ash.--Empirical research and the problem of court delay, by L. Foschio.--Reducing court delay, by H. Haynes.--Simulation of a criminal court case processing system, by R. Nayar and W. Blevel.--A study of juror utilization, by W. Pabst, Jr.

Rehnquist, William H. "Act well your part, therein all honor lies." Human rights, v. 9, spring 1980: 42-47, 56.

"Justice Rehnquist cautions the Court's critics: base your criticism 'on logical analysis and scholarship if it is to be any more helpful . . . than a letter to the editor . . . '"

Reynolds, William L. Judicial process in a nutshell. St. Paul, Minn., West Pub. Co., 1980. 292 p. (Nutshell series)

Rosenberg, Maurice. Anything legislatures can do, courts can do better? American Bar Association journal, v. 62, May 1976: 587-590.

"Courts have the power to invalidate, interpret, and obliterate statutes, but they lack the mechanisms and capabilities of gathering the data frequently needed for these decisions. A governmental depository or information resource should be established to provide courts with the necessary social and technological data."

Schaefer, Walter V. Reducing circuit conflicts. American Bar Association journal, v. 69, Apr. 1983: 452-455.

"There has been a breakdown in the uniformity of federal law. By rule and decision the Supreme Court could increase certainty and reduce discordant rulings by the circuit courts."

Schulert, Barbara, and Bill Hoeizel. Court reform, the unheralded winner of the 1976 elections. Judicature, v. 60, Jan. 1977: 281-289.

Authors discuss the judicial reforms which were decided upon in several States during the 1976 elections. "New judicial articles were adopted in Missouri, Nevada and North Dakota, Maryland and Wyoming; and disciplinary procedures were modified and strenghtened in California and Connecticut."

Siegel, Loren. Law enforcement and civil liberties: we can have both. Civil liberties, no. 345, Feb. 1983: 5-8.

American Civil Liberties Union attorney sets forth his organization's opposition "to 'crime fighting' proposals that would expand governmental power at the expense of the rights of innocent people" and calls for "a serious approach to crime, one which combines short-term criminal justice reforms with long-term programs that ameliorate crime's underlying causes."

Silberman, Charles E. Criminal violence, criminal justice. New York, Random House, c1978. 540 p.

Also published in paperback by Vintage Books.

Sipes, Larry L. Managing to reduce delay. Williamsburg, Va., National Center for State Courts, c1980. 169 p.

State court reform; symposium. American University law review, v. 31, winter 1982: 207-289.

Contents.--Introduction to State court reform, by P. Reardon.--State trial court delay: efforts at reform, by J. Trotter, Jr. and C. Cooper.--Appellate courts: the challenge of inundation, by J. Weisberger.--Improving court operations in rural areas, by T. Fetter.--State court system unification, by H. Lawson.

State courts seeking to draw blueprint for the future. American Bar Association journal, v. 64, May 1978: 653-655.

Discusses the plans and proposals considered by the attendees at the March, 1978 Williamsburg conference sponsored by the National Center for State Courts. Discusses the reaction of the conferees to a survey which was conducted to determine what the public thinks about the nation's courts. The survey findings indicated that "many Americans may have lost faith in their system of justice."

Stewart, Alva W. The National Center for State Courts: a preliminary bibliography. Monticello, Ill., Vance Bibliographies, 1980. 15 p. (Public administration series: bibliography P-421)

This bibliography lists articles about and selective publications of the National Center for State Courts, a clearinghouse of information relating to State courts which is near the end of its first decade of service.

Struggle for justice; a report on crime and punishment in America. New York, Hill and Wang, 1971. 179 p.

Partial contents.--Crime and punishment.--The fallacy of the individualized treatment model.--General deterrence.--Preventive detention.--The crime of treatment.--Repressive functions of the criminal justice system.--The proper role of criminal law.

Sweet, Linda F. Anatomy of a 'court reform'. Judicature, v. 62, June-July 1978: 37-43.

Judicial planner for the Office of the Executive Secretary of the Tennessee Supreme Court discusses court reform efforts proposed by a Tennessee Constitutional Convention. Discusses criticisms of the Tennessee proposal which were expressed by the chief justice of the State supreme court, the American Judicature Society, and other groups, noting that these and other criticisms led to the rejection of the new judicial article by the voters in 1977.

Symposium: State courts in the 1980s and beyond. Northwestern University law review, v. 74, Dec. 1979: 711-802.

Partial contents.--Interstate venue, by G. Hazard, Jr.--Interstate preclusion by prior litigation, by E. Scoles.--State courts and Federal declaratory judgments, by D. Shapiro.--Toward a pragmatic solution of choice-of-law problems--at the interface of substance and procedure, by A. Twerski and R. Mayer.

Symposium: the judiciary in the eighties. Catholic University law review, v. 31, winter 1982: 157-171, 173-199, 201-211, 213-225.

Symporium articles "are based either on speeches delivered by the panelists or are outgrowths of the . . . National Conference on the Role of the Judge in the '80s," Washington, D.C., 1981.

Partial contents.--The instant society and the rule of law, by R. Bird. --Against an activist court, by R. Berger.--Judicial restraint reappraised, by C. Lamb.--The judge's role in educating the public about the law, by M. Tucker.--Judicial work in the 1980s: nuts and bolts, by P. Nejelski.

Tarr, G. Alan. Court unification and court performance: a preliminary assessment. Judicature, v. 64, Mar. 1981: 356-368.

Article identifies basic elements of a unified court system, which include: a consolidated court structure; centralized management of the court system; centralized rule-making; and State financing of the courts. Examines specific claims about the effects of unification and considers the results produced by unification efforts.

Tribe, Laurence H. Too much law, too little justice. Atlantic monthly, v. 244, July 1979: 25-30.

"Too much law, too little justice; too many rules, too few results--that is our problem. Obviously, the answer is not to abandon law or renounce all rules, leaving the powerless unprotected and inviting social chaos. The answer is to deregulate and simplify selectively, attacking only those laws and legal processes that aggravate injustice."

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Courts, Civil Liberties, and the Administration of Justice. State Justice Institute/annual message of Chief Justice--1980. Hearing, 96th Cong., 2d sess., on H.R. 6709, S. 2387, S. 2483, and H.R. 6597. Sept. 19, 1980. Washington, G.P.O., 1981. 276 p.
"Serial no. 65"
This hearing is to "consider specific legislative proposals to aid State and local governments in strengthening and improving their judicial systems through the creation of a State Justice Institute."

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. Causes of popular dissatisfaction with the administration of justice. Hearing, 94th Cong., 2d sess. May 19, 1976. Washington, G.P.O., 1976. 121 p.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Courts. Court reform legislation. Hearing, 97th Cong., 1st sess., on S. 1529, S. 1531, and S. 1532. Nov. 16, 1981. Washington, G.P.O., 1982. 243 p.
"Serial no. J-97-81"

----- Federal Courts Improvement Act of 1981--S. 21, and State Justice Institute Act of 1981--S. 537. Hearing, 97th Cong., 1st sess. May 18, 1981. Washington, G.P.O., 1981. 379 p.
"S. 537 a bill to aid state and local governments in strengthening and improving their judicial systems through the creation of a State Justice Institute."
"Serial no. J-97-34"

----- Legislation for the improvement of the judiciary. Hearing, 97th Cong., 2nd sess. Sept. 24, 1982. Washington, G.P.O., 1983. 478 p.
"Serial no. J-97-141"
This hearing considers proposals to create a National Court of Appeals.

U.S. Department of Justice. Attorney General's Task Force on Violent Crime. Final report. Washington, For sale by the Supt. of Docs., G.P.O., 1981. 94 p.
Contents.--Federal law and its enforcement.--Criminal procedure.--Federalism in criminal justice.--Juvenile crime.--Victims of crime.

U.S. General Accounting Office. Federally supported attempts to solve State and local court problems: more needs to be done, Law Enforcement Assistance Administration, Department of Justice; report to the Congress by the Comptroller General of the United States. [Washington] 1974. 46 p.
"B-171019, May 8, 1974"
Reviews LEAA grants to California, Colorado, Illinois, Massachusetts, New York and Pennsylvania, and concludes that "LEAA has not made sure that its grants for State court improvement programs are directed to causes of the most serious problems in State and local courts."

U.S. President's Commission on Law Enforcement and Administration of Justice. The challenge of crime in a free society; a report. New York, Dutton, 1968 [i.e. 1969] 814 p.
Commonly known as the Crime Commission Report.

Weapons, crime, and violence in America: a literature review and research agenda. Washington, National Institute of Justice, for sale by the Supt. of Docs., G.P.O., 1981. 592 p.
Partial contents.--How many guns in private hands?--On crime and private weapons.--Crime and violence: characteristics of victims and offenders.--Firearms used in crime.--Public opinion and gun control.--Regulating firearms: an overview of Federal, state, and local legislation.--Weapons control legislation and effects on violent crime.

Weinstein, Jack B. Coordination of State and Federal judicial systems. St. John's law review, v. 57, fall 1982: 1-29.
"Article explores some of the problems in coordinating the state and federal judicial systems from the perspective of a federal trial judge in a large metropolitan area."

----- Reform of Federal court rulemaking procedures. Columbia law review, v. 76, Oct. 1976: 905-964.
Article holds "that the power of courts to make their own procedural rules is an integral aspect of judicial independence. . . . Discusses reforms necessary for a more effective and less abrasive exercise of rulemaking power."

Wheeler, Russell. Judicial reform: basic issues and references. Policy studies journal, v. 8, autumn 1979: 134-149.
Presents an overview of "current issues and references in judicial administration." Discusses such issues as court objectives, and judicial management.

Wilson, James Q. Coping with crime. Criminal justice review, v. 1, fall 1976: 1-12.
"Discusses some objective and subjective reasons for the rise in the crime rate in the late 1960's and early 1970's and presents a symptomatic approach to dealing with this crime rate."

----- Crime and American culture. Public interest, no. 70, winter 1983: 22-48.
Tries "to explain the relationship between crime and the conditions of American life" by looking at the historical development of crime.

Winberry, Philip B. Washington State court reform. State court journal, v. 4, spring 1980: 3-8, 27-33.

Winkle, John W., III. Dimensions of judicial federalism. In Intergovernmental relations in America today. Philadelphia, American Academy of Political and Social Science, 1974. (Annals, v. 416, Nov. 1974) p. 67-76.
"Distribution of power between national and subnational judiciaries is a significant yet often overlooked dimension of American federalism. Jurisdictional overlap between state and federal courts has long generated administrative and political tensions that strike at the heart of intergovernmental viability."

II. RESOLVED: THAT THE U.S. SHOULD ADOPT UNIFORM RULES GOVERNING THE CRIMINAL INVESTIGATION PROCEDURE OF ALL PUBLIC LAW ENFORCEMENT AGENCIES IN THE NATION

Adams, Nathan M. To catch a killer: the search for Ted Bundy. Reader's digest, v. 118, Mar. 1981: 202-209, 226, 228-230, 235-237.
Reports on the extensive criminal investigation used to finally capture Theodore Bundy.

Allinson, Richard S. Police accreditation: a new effort to set standards. Police magazine, v. 3, Jan. 1980: 52-54.
Describes the Accreditation Program for Law Enforcement Agencies which would set up performance standards for police departments.

Belknap, Michal R. Uncooperative Federalism: the failure of the Bureau of Investigation's intergovernmental attack on radicalism. Publius, v. 12, spring 1982: 25-47.
Finds that a tradition of "opposition to the extensive supervision and control of local law enforcement by the national government" contributed in large part to the failure of the Bureau of Investigation (now the FBI) to destroy the newly organized American Communist movement in the early 1920s, using a series of prosecutions under State sedition and criminal syndicalism laws.

Brancato, Gilda, and Elliot E. Polebaum. The rights of police officers. New York, Avon Books, c1981. 208 p. (American Civil Liberties Union handbook)

Brill, Steven. Entrapped? American lawyer, v. 5, Jan. 1983: 1, 73-80.
Examines the actions of investigators and prosecutors in three FBI undercover "stings"--the De Lorean cocaine arrest, the Hitachi-IBM computer trade-secret theft, and particularly the Abscam operation--to demonstrate "the prosecutorial abuses these kinds of cases allow." The author argues that stings should be limited to ongoing criminal activity.

Cann, Steven, and Bob Egbert. The exclusionary rule: its necessity in constitutional democracy. Howard law journal, v. 23, no. 2, 1980: 299-323.
Article notes with alarm the bar's and the legal literature's criticisms of the exclusionary rule and challenges "the assumptions that the primary purpose of the exclusionary rule is to deter and that as a deterrent it is effective."

Canon, Bradley, and Steven R. Schlesinger. [Exclusionary rule] Judicature, v. 62, Mar. 1979: 398-409; Apr.: 455-458.
Two social scientists discuss a question in the continuing debate over the exclusionary rule of evidence: does the rule really deter police from making illegal searches?

Cawley, Donald F., and others. Managing criminal investigations manual. [Washington] Office of Technology Transfer, National Institute of Law Enforcement and Criminal Justice, 1977. 252 p.
Partial contents.--The investigative roles of patrol.--Case screening.--Management of the continuing investigation.--Police-prosecutor relations.--The monitoring system.--Organization and allocation of resources.

Chaiken, Jan M., Peter W. Greenwood, and Joan Petersilia. The criminal investigation process: a summary report. Policy analysis, v. 3, spring 1977: 187-217.
"The authors discuss the methodology, findings, and policy implications of Rand's nationwide study of the criminal investigation process in municipal and county police departments."

Collins, Ronald K. L., and Robert Welsh. Miranda's fate in the Burger Court. Center magazine, v. 13, Sept.-Oct. 1980: 43-52.
Analyzes the effect of the Supreme Court's decision in Rhode Island v. Innis in the use of Miranda in police interrogation.

Creamer, J. Shane. The law of arrest, search, and seizure. 3d ed. New York, Holt, Rinehart, and Winston, c1980. 653 p.

Cronin, Thomas E., Tania Z. Cronin, and Michael E. Milakovich. U.S. v. crime in the streets. Bloomington, Indiana University Press, c1981. 212 p.
A history of the Law Enforcement Assistance Administration.

Daley, Robert. The search for 'Sam': why it took so long. New York, v. 10, Aug. 22, 1977: 37-38, 43-45.
Using the search for "Son of Sam" as an example, the author analyzes whether the New York detective is able to cope with modern crimes.

DeLesseps, Suzanne. Crime reduction: reality or illusion. [Washington, Congressional Quarterly] 1977. 539-555 p. (Editorial research reports, 1977, v. 2, no. 3)
Partial contents.--Criminal activity in America.--Past efforts to control crime.--Directions of future efforts.

Diegelman, Robert F. Federal financial assistance for crime control: lessons of the LEAA experience. Journal of criminal law & criminology, v. 73, fall 1982: 994-1011.
Examines the 13-year history of the Law Enforcement Assistance Administration, concentrating on the flaws in the program.

Gage, Nicholas, and Joan Gage. 'Don't call me an informant.' New York times magazine, July 11, 1976: 16, 42-43.

"Irwin Nadborn makes his living by posing as various underworld figures. His impersonations have led to many arrests--and a few misgivings."

Gage, Theodore. Cops, inc. Reason, v. 14, Nov. 1982: 23-28.

"Police forces run by profit-making firms? Several small towns have found that it's good for the budget and good for the citizens. A REASON investigation takes you to the scene to see how it works--and who's opposed to the innovation."

Greenberg, Ilene, and Robert Wasserman. Managing criminal investigations. Washington, National Institute of Law Enforcement and Criminal Justice, for sale by the Supt. of Docs., G.P.O., 1979. 132 p.

Outlines "a range of options for better management of the police investigative" functions. Outlines the elements which compose a managed program. These elements include: "initial investigation, case screening, managing the continuing investigation, police-prosecutor relations, and investigative monitoring system."

Hagerty, James Emmett. Criminal justice: toward a new Federal role. Public administration review, v. 38, Mar.-Apr. 1978: 173-176.

Advocates five reforms for the LEAA program.

Horgan, William P. A look at local control and efforts toward consolidation of police service. Journal of police science and administration, v. 8, Mar. 1980: 1-4.

Concludes that "small communities as well as larger cities and towns will have to take a closer look at some type of regionalization of police services. Whether it be a partial type of regionalized services, such as a central agency to cope with the major crimes, or a total regionalized service, the decision will ultimately be made by the citizenry in their demand for better law enforcement."

Kamisar, Yale. The search and seizure of America. Human rights, v. 10, winter 1982: 14-17, 46-47.

Contends that "the movement to destroy the exclusionary rule is growing in momentum. Its success could cripple our system of justice."

Kleinman, David Marc. Out of the shadows and into the files: who should control informants? Police magazine, v. 3, Nov. 1980: 36-44.

"The debate over the use of informers comes down to this question: who should 'own' them--the detectives or the department?"

Krajick, Kevin. Consolidation. Police magazine, v. 2, Jan. 1979: 47-56.

Considers both the benefits and the problems which occur when small police departments are consolidated into larger units. Focuses on the experience of the Clark County, Nevada sheriff's department and the Las Vegas City police who were consolidated into one unit, the Las Vegas Metropolitan Police.

Leepson, Marc, and Hoyt Gimlin. Violent crime's return to prominence. [Washington, Congressional Quarterly] 1981. 191-208 p. (Editorial research reports, 1981, v. 1, no. 10)

Contents.--Question of crime's increase.--Washington's changing strategy. --Revival of gun control issue.

Lindgren, James. Organizational and other constraints on controlling the use of deadly force by police. In Gun control. Philadelphia, American Academy of Political and Social Science, 1981. (Annals, v. 455, May 1981) p. 110-119.

"The structure of police departments, the nature of the decision to fire a gun, and the pressures on the review of the use of deadly force all make reducing the unnecessary use of force difficult. In addition, as long as the density of guns in a community is high, police policymaking is further restricted."

Linowes, David F. Must personal privacy die in the computer age? American Bar Association journal, v. 65, Aug. 1979: 1180-1184.

Asserts that because "computer technology enables sophisticated eavesdroppers to know all about" individual's activities, Federal legislation in this area is needed.

Maitland, Leslie. At the heart of the Abscam debate. New York times magazine, July 25, 1982: 22-23, 29-31, 40, 44.

"The Abscam investigation raised doubts about the legality of the F.B.I.'s use of covert techniques. These are now being questioned by Congress and the courts."

Martin, Carol Ann. Basics of criminal investigation: a selected bibliography. Monticello, Ill., Vance Bibliographies, 1980. 41 p. (Public administration series: bibliography P-571)

Presents information on such aspects of the criminal investigation as organizing investigations, report writing, interviewing, note-taking, collection and marking of evidence, and court procedure.

Moore, Mark H., and George L. Kelling. "To serve and protect": learning from police history. Public interest, no. 70, winter 1983: 49-65.

"Reviews the history of American policing and notes some of the paths abandoned along the way."

Offenburger, Charles. Contract policing: who will pay the bill? Police magazine, v. 2, Jan. 1979: 57-60.

Reviews the background of the unified, county-wide law enforcement system presently in use in Decatur County, Iowa. The original grant for unifying and upgrading the sheriff's department came from LEAA but with its expiration and no permanent funding arrangement, there is doubt each year whether taxpayers will continue to support the system.

The Police and violence. Philadelphia, American Academy of Political and Social Science, 1980. 211 p. (Annals, v. 452, Nov. 1980)

Partial contents.--What can the police do about violence? by J. Wilson. --Power attracts violence, by W. Muir, Jr.--Killing the police: myths and motives, by M. Margarita.--Police shootings at minorities: the case of Los Angeles, by M. Meyer.--Controlling police use of deadly force, by A. Reiss, Jr.--Beyond account: the personal impact of police shootings, by J. Van Maanen.

Rosenblatt, Albert M., and Julia Carlson Rosenblatt. A legal house of cards. Harper's magazine, v. 255, July 1977: 18-21.

Argues that the exclusionary rule has failed to deter illegal police searches, contributed to delayed or deferred justice for criminals, encouraged police perjury and alienated the public from the workings of the criminal justice system. The authors hold that the rule should distinguish between deliberate and inadvertent improper searches and seizures.

Schwartz, Herman. Time to get the bugs out. Nation, v. 231, Oct. 25, 1980: 401-403.

Expresses alarm at the growing use of the "room bug" as an investigative tool. Calling this all-hearing form of electronic surveillance much worse than a wiretap, which hears only telephone conversations, the author worries that improved technology will bring about still greater recourse to bugs.

Twentieth Century Fund. Task Force on the Law Enforcement Assistance Administration. Law enforcement: the Federal role; report. New York, McGraw-Hill [1976] 145 p.

Report "calls for a fundamental restructuring of LEAA and its relationship with state and local agencies."

Includes a background paper by Victor Navasky with Darrell Paster.

U.S. Congress. House. Committee on Government Operations. Outlook for multistate regional intelligence projects; twelfth report. Washington, G.P.O., 1981. 16 p. (Report, House, 97th Congress, 1st session, no. 97-280)

U.S. Congress. House. Committee on Government Operations. Government and Individual Rights Subcommittee. Multistate regional intelligence projects. Hearings, 97th Cong., 1st sess. May 27 and 28, 1981. Washington, G.P.O., 1981. 294 p.

----- The relationship between the Department of Justice and the State/local criminal justice communities. Hearing, 97th Cong., 2nd sess. Dec. 9, 1982. Washington, G.P.O., 1983. 91 p.

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Civil and Constitutional Rights. FBI undercover guidelines. Oversight hearings, 97th Cong., 1st sess. Washington, G.P.O., 1981. 183 p.
"Serial no. 18"
Hearings held Feb. 19-26, 1981.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. Surveillance technology--1976; policy and implications: an analysis and compendium of materials. Washington, For sale by the Supt. of Docs., G.P.O., 1976. 1280 p.
At head of title: 94th Cong., 2d sess. Committee print.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Juvenile Justice. Federal financial assistance to State and local law enforcement. Hearings, 97th Cong., 2nd sess., on oversight hearings on proposed legislation providing Federal financial assistance to State and local law enforcement agencies, and to review the effects of budgetary reductions for criminal justice assistance programs; and on H.R. 4481. Washington, G.P.O., 1982. 201 p.
"Serial no. J-97-105"
Hearings held Feb. 11 and Mar. 18, 1982.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Security and Terrorism. Domestic security (Levi) guidelines. Hearings, 97th Cong., 2nd sess. Washington, G.P.O., 1983. 587 p.
"Serial no. J-97-124"
Hearings held June 24-Aug. 12, 1982.

U.S. Congress. Senate. Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice. Final report to the U.S. Senate. Washington, G.P.O., 1983. 790 p. (Report, Senate, 97th Congress, 2nd session, no. 97-682)
Partial contents.--The Attorney General's guidelines.--The Abscam operation: an example of the benefits and risks of a long term, complex FBI undercover operation and a demonstration of the need for modifications to existing statutes, guidelines, and operational procedures.--Other undercover operations of the Department of Justice.--Recommendations for legislation.

U.S. Dept. of Justice. Attorney General's Task Force on Violent Crime. Final report. Washington, For sale by the Supt. of Docs., G.P.O., 1981. 94 p.
Contents.--Federal law and its enforcement.--Criminal procedure.--Federalism in criminal justice.--Juvenile crime.--Victims of crime.

Wadman, Robert C., and Don Svet. Rules and regulations for State and local law enforcement agencies. Springfield, Ill., Charles C. Thomas, 1975. 93 p.
This work discusses such issues as arrests, wearing and carrying of the badge, conduct at line ups, confidential information, prisoner and suspect control, and other topics.

Webster, William H. Why the FBI uses undercover agents. U.S. news & world report, v. 93, Aug. 16, 1982: 50-52.
"Covert operatives neither 'create crime' nor 'entrap' the innocent, asserts the chief of the elite law enforcement agency in answer to charges by critics."

Wilson, James Q. Broken windows; the police and neighborhood safety, by James Q. Wilson and George L. Kelling. Atlantic monthly, v. 249, Mar. 1982: 29-36, 38.

Examines the factors which cause citizens to be fearful of crime. Looks at the effect of different kinds of police activities for dealing with crime.

----- Buggings, break-ins & the FBI. Commentary, v. 65, June 1978: 52-58.

Presents the recent history of wiretapping and surreptitious entries by the FBI, and comments on the indictments of L. Patrick Gray, W. Mark Felt, and Edward S. Miller. Reviews the laws governing unconventional investigative techniques and concludes that there are reasonable grounds for warrantless surveillances in some cases.

----- The changing FBI--the road to Abscam. Public interest, no. 59, spring 1980: 3-14.

Denies charges growing out of the FBI's Abscam and other "sting" investigations "that the Bureau has launched a 'vendetta' against Congress or that it is 'out of control.' It is nothing of the kind. It is an organization that is following out the logic of changes and procedures adopted to meet the explicit demand of Congress" to redirect its energies toward organized and white-collar crime.

III. RESOLVED: THAT THE U.S. SHOULD ESTABLISH UNIFORM RULES GOVERNING THE PROCEDURE OF ALL CIVIL COURTS IN THE NATION

Bell, Griffin B. Improving the justice system. Trial, v. 13, Nov. 1977: 22-25.

Attorney General discusses how the administration of justice in this country could be improved, focusing on "matters of special interest to lawyers involved in civil litigation." His proposals include increasing the number of magistrates, using arbitration in the Federal courts for certain types of civil cases, and restricting diversity jurisdiction in some cases.

Brazil, Wayne D. The adversary character of civil discovery: a critique and proposals for change. Vanderbilt law review, v. 31, Nov. 1978: 1295-1361.

Article maintains "that the adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed. The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution."

Brill, Steven. Columbus diary. American lawyer, v. 3, July 1981: 32-40.

Examines how well the civil legal system worked on one day in one place (Law Day 1981 in Columbus, Ohio), finding, contrary to recent criticisms about the quality of American justice, that in Columbus, "most people like their lawyers, and the lawyers perform well in a system that peaceably and without too much delay resolves disputes."

Brown, Winifred R. Federal rulemaking: problems and possibilities. [Washington] Federal Judicial Center, 1981. 140 p.

Analyzes process by which civil rules are promulgated by the courts and examines possible improvements in this system.

Cohn, Sherman L. Federal discovery: a survey of local rules and practices in view of proposed changes to the Federal rules. Minnesota law review, v. 63, Jan. 1979: 253-297.

Article examines local "attempts to limit the consumption of judicial resources, to expedite the discovery process, the curb abuses in the use of discovery methods and to provide for more effective sanctions. A comparison is made between these local practices and the reforms that have been proposed by the Advisory Committee, the ABA, and the Second Circuit Commission. This Article is based on an examination of the local rules of the district courts and an informal survey of federal district courts by the Federal Judicial Center."

DeSeife, Randolphe J. A. A plea for the creation of commercial courts. New England law review, v. 17, no. 2, 1982: 437-459.

"Article proposes a new systematic approach to the litigation of commercial cases. The author advocates a special commercial court institution based upon expedient procedures and the expertise of those charged with its management. The impetus for this proposal originates from the current overabundance of civil suits clogging the state and federal courts."

Engel, David M., and Eric H. Steele. Civil cases and society: process and order in the civil justice system. American Bar Foundation research journal, v. 1979, spring 1979: 295-346.

"The first part of this essay focuses on what the civil justice system is and does. It presents a five-stage model of civil case proceedings and examines relationships between this model and the criminal justice system. The second part of the essay considers this model in a broader context. Here the authors examine two paradigms of civil case processing and their implications for the implementation of legal norms and the pursuit of justice in society."

Flanders, Steven. In praise of local rules. Judicature, v. 62, June-July 1978: 28-36.

"Local court rules may not be popular among scholars, but they are rarely criticized by those who practice in the federal courts." Argues that "local rules do not undermine uniformity of national procedure significantly; that the problems that exist are exceptional and remediable, not systemic; that many of the criticisms against local rules do not stand up under close scrutiny; and that local rules constitute a very important tool for district court administration."

Frankel, Marvin E. From private fights toward public justice. New York University law review, v. 51, Oct. 1976: 516-537.

"The American values of individualism and competition have shaped our system of trials and procedure, producing the adversary model. Public authorities have traditionally taken only the passive role of umpire in settling private disputes. The author . . . urges public authorities to take a stronger hand in resolving private quarrels."

Friedman, Barry Evan. Computer discovery in Federal litigation: playing by the rules. Georgetown law journal, v. 69, Aug. 1981: 1465-1494.

Comment "illustrates the ready applicability of the Federal Rules of Civil Procedure to computer-aided discovery [and] . . . offers interpretation of the rules to solve problems that the courts have addressed inappropriately."

Gordon, Storrow Moss. Manageability under the proposed Uniform Class Actions Act. Southwestern law journal, v. 31, summer 1977: 715-738.

Article "examines the means by which the Uniform Class Actions Act attempts to solve the manageability problems which have arisen under the federal rule, analyzes the policy decisions embodied in the Act, and delineates some of the consequences of the Act for class action litigants in the state courts."

Holland, Kenneth M. The Federal Rules of Civil Procedure. Law & policy quarterly, v. 3, Apr. 1981: 209-224.

"The success rate of the Federal Rules of Civil Procedure is evaluated in the light of 42 years of experience under them and of alternative modes of adjucating civil disputes. The intentions of the rules' framers are explored as are hypotheses as to why they have been only partially successful. On the basis of this analysis, the author argues that adversary presentation and prosecution must be modified in the direction of a system of direct inquiry by the court and of active judicial management of disputes to settlement or trial."

Johnson, Earl, Valerie Kantor, and Elizabeth Schwartz. Outside the courts. State court journal, v. 1, spring 1977: 3-5, 34-47.

"Commissioned by the National Center [for State Courts] because of the growing interest in dispute resolution by methods outside the formal judicial system, Outside the Courts: A Survey of Alternatives to Civil Litigation describes important alternatives to the dispute resolution tasks presently assigned almost exclusively to the courts. This excerpt from the recently released publication presents important considerations for this method of judicial reform."

Kane, Mary Kay. Civil procedure in a nutshell. St. Paul, West Pub. Co., 1979. 271 p. (Nutshell series)

Provides an introduction to and a compact overview of civil procedure.

Kersten, Montgomery. Preserving the right to jury trial in complex civil cases. Stanford law review, v. 32, Nov. 1979: 99-120.

Comment concludes that "our flexible system of civil procedure currently provides safeguards that can guarantee the parties their constitutional rights to a fair trial before a jury in complex federal civil cases."

Litigation symposium. California law review, v. 69, May 1981: 647-836.

Partial contents.--The Federal judge as a case manager: the new role in guiding a case from filing to disposition, by R. Peckham.--A divided Supreme Court adopts discovery amendments to the Federal Rules of Civil Procedure, by J. Friedenthal.

Marcus, Richard L. Reducing court costs and delay: the potential impact of the proposed amendments to the Federal Rules of Civil Procedure. Judicature, v. 66, Mar. 1983: 363-370.

Asserts that "although they impose few requirements, the new amendments to the Federal Rules of Civil Procedure provide a framework for more aggressive pre-trial control by the judge."

Person, Carl. Justice Inc.: a proposal for a profit-making court. Juris doctor, v. 8, Mar. 1978: 32, 34, 37-41.

President of Paralegal Institute, Inc., discusses his newly established "National Private Court" (NPC). "The NPC is a national court system parallel to the federal court system, except that litigation (after one appeal) is completed within three months; litigation costs are low; judges, selected and paid by the parties, are experienced in the same type of litigation; judges have sufficient time to hear all meritorious claims and defenses; and NPC proceedings take place in the law office of the judge."

Petito, Susan R. Federal Rule of Civil Procedure 52(a) and the scope of appellate fact review: has application of the clearly erroneous rule been clearly erroneous? St. John's law review, v. 52, fall 1977: 68-91.

Comment finds that the application of the rule allowing appellate courts to set aside "clearly erroneous" findings of facts has "in cases where the evidence is documentary or undisputed . . . been anything but uniform."

Rochelle, Ann M. Wyoming's Uniform Declaratory Judgments Act: statutory and case law analysis. Land and water law review, v. 16, no. 1, 1981: 243-267.

"In analyzing Wyoming's Uniform Declaratory Judgments Act, its construction, interpretation and application, this comment . . . reviews the history of declaratory relief, the enactment of the Uniform Act; presents an overview of Wyoming's statutory declaratory relief law and Rule 57 of the Wyoming Rules on Civil Procedure; examines the availability of declaratory relief, focusing on the uniqueness of the remedy of declaratory relief, the issue of a justiciable controversy, the availability of alternative remedies, and the requirement of interested parties; details the pleadings and procedure by which declaratory relief is obtained; and discusses the applications of Wyoming's Act to specific situations in the case law."

Scher, Irving. Opening State courts to class actions: the Uniform Class Action Act. Business lawyer, v. 32, Nov. 1976: 75-98.

Article outlines provisions of the Uniform Class Actions Act recommended for enactment by state legislatures by the National Conference of Commissioners on Uniform State laws. The act and commentary on it are presented on p. 83-98.

Seltzer, Cheryl E. California's pilot project in economical litigation. Southern California law review, v. 53, July 1980: 1497-1525.

Comment "explores the history of discovery in California civil cases, along with the goals that prompted the development of discovery procedures. The ELP [Economical Litigation Pilot] Project is then compared to both the early and present California discovery rules. Additionally, similarities between the project's procedures and the procedures in arbitration proceedings, workers' compensation hearings, administrative hearings, small claims court proceedings, and the federal court system are discussed. This Note examines the pilot project rules applicable to the municipal and superior courts, and sets forth some preliminary results of the experiment."

Thibaut, John, and Laurens Walker. A theory of procedure. California law review, v. 66, May 1978: 541-566.

"The search for the most effective conflict resolution procedure requires identification of the primary objective in resolving different kinds of disputes. This Article focuses on the kind of disputes considered in the legal system and draws on the results of the authors' empirical studies to develop a general theory of procedure for attaining the objectives of 'truth' and 'justice' in situations of congnitive conflict, conflict of interest, and in 'mixed' disputes."

U.S. Administrative Office of the United States Courts. The United States courts: a pictorial summary through the twelve-month period ended June 30, 1979. Washington, For sale by the Supt. of Docs., G.P.O., 1979. 23 p.

Presents charts, graphs, and statistical information on the increase in the civil and appellate court case loads during the twelve-month period, on jury use and on duties performed by magistrates.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Citizens and Shareholders Rights and Remedies. Citizens' Access to the Courts Act of 1978. Hearing, 95th Cong., 2nd sess., on S. 2390. Part 1. Apr. 20, 1978. Washington, G.P.O., 1978. 70 p.

"S. 2390 to amend title 28, United States Code, to reduce financial barriers to citizens' access to the courts for violations of their rights."

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Improvements in Judicial Machinery. Equal access to courts. Hearing, 95th Cong., 2nd sess., on S. 2354. Mar. 13, 1978. Washington, G.P.O., 1978. 103 p.

U.S. General Accounting Office. Better management can ease Federal civil case backlog; report to the Congress by the Comptroller General of the United States. [Washington] 1981. 59 p.
"GGD-81-2, Feb. 24, 1981"
"The number of pending civil cases in Federal district courts increased over 70,000 between 1974 and 1979, creating a concern on the part of the Congress, the Judiciary, the Department of Justice, and the public. GAO visited nine courts and found that the intensity of the backlog problem was directly related to the efficiency of case management. Ineffective use of personnel and an inadequate number of judges also affected the processing of civil cases. GAO recommends modifying the Federal Rules of Civil Procedure as an appropriate way to help reduce the backlog. The Administrative Office of the United States Courts disagrees. In contrast, four chief judges and the Justice Department agree that a modification providing for flexible time frames would improve the efficiency of the civil process."

U.S. Laws, statutes, etc. Rules of Civil Procedure for the United States District Courts. Washington, G.P.O., 1982. 101 p.
At head of title: 97th Cong., 2nd sess. Committee print no. 19.
"Printed for the use of the Committee on the Judiciary, House of Representatives."

U.S. Supreme Court. Amendments to the Federal Rules of Civil Procedure; communication from the Chief Justice of the United States. Washington, G.P.O., 1982. 388 p. (Document, House, 97th Congress, 2nd session, no. 97-173)

IV. RESOLVED: THAT THE U.S. SHOULD ESTABLISH UNIFORM RULES GOVERNING THE PROCEDURE OF ALL CRIMINAL COURTS IN THE NATION

American Enterprise Institute for Public Policy Research. Reform of Federal criminal laws. Washington [1978] 54 p. (Legislative analysis, 95th Cong., no. 26)
This study reviews the bills pending in Congress which will "simplify, update, systematize, and revise criminal statutes involving the more serious offenses."

Berman, Joel J. Sentencing reform of S. 1437: will guidelines work? Harvard journal on legislation, v. 17, winter 1980: 98-122.
"Author suggests in this Note that Congress must outline precise sentencing philosophies and limit sentencing criteria before any new bill can adequately curtail the unwanted judicial discretion possible under current law."

Blum, Bill. S. 1 [Senate Bill One] rides again. Progressive, v. 45, Dec. 1981: 39-41.
Examines legislative attempts to reintroduce S. 1-type Criminal Code reform legislation in the 97th Congress.

Brody, Richard H. The proposed Federal Criminal Code: an unwarranted expansion in Federal criminal jurisdiction. Ohio State law journal, v. 39, no. 1, 1978: 132-157.
Comment opposes the proposed code (S. 1437 of the 95th Congress) because it "contains new and startling expansions of federal jurisdiction--the power of the federal government to define and punish criminal activity--over what has previously been considered 'intrastate' crime."

Cain, Anthony A., and Marjorie Kravitz. Jury reform: a selected bibliography. [Washington] U.S. Law Enforcement Assistance Administration, 1978. 39 p.
"This bibliography has been compiled from documents in the collection of the National Criminal Justice Reference Service with the goal of providing jury commissioners, court administrators, and others interested in jury reform, with a resource that will assist them in weighing the various proposals for jury reform."

Chaiken, J., and others. Criminal justice models: an overview. [Washington] National Institute of Law Enforcement and Criminal Justice [for sale by the Supt. of Docs., G.P.O.] 1976. 162 p.

"Criminal justice agencies have been among the last to adopt computer models to the planning and decisionmaking process--in part, because it is only recently that the criminal justice system has been treated as a system, rather than a series of unrelated parts. This study searches out examples of the best existing criminal justice simulations, describes their characteristics, and discusses their value for criminal justice agencies."

Chandler, William B., III, and Alan C. Runyan. The new Federal Rules of Evidence and South Carolina evidentiary law: a comparison and critical analysis. South Carolina law review, v. 28, Feb. 1977: 481-563.

Comment supports the need for a uniform system of State rules of evidence which is codified and easily accessible and suggests that South Carolina should adopt a code similar to the Federal Rules of Evidence. Notes that the State codification should also include references to the areas of the law which differ from the Federal rules.

Cohodas, Nadine. New movement on Criminal Code reform. Congressional quarterly weekly report, v. 37, Sept. 1, 1979: 1899-1906.

Discusses the Federal Criminal Code bills which will be considered in hearings in both the House and Senate. Discusses how bills in the 96th Congress differ from earlier versions of the proposed Federal Criminal Code reform legislation.

----- Sentencing reform measures seek to reduce disparities. Congressional quarterly weekly report, v. 41, Feb. 12, 1983: 337-340.

Examines proposals in the 98th Congress to reform sentencing laws. "Unlike previous years, when sentencing legislation was part of omnibus criminal code reform bills, the issue this year is likely to emerge in separate proposals designed only to improve the sentencing system. This strategy is intended to . . . focus solely on sentencing and avoid the disputes that invariably arise when more wide-ranging criminal law reform bills are debated."

Cole, George F. Will definite sentences make a difference? Judicature, v. 61, Aug. 1977: 58-65.

"Legislatures in more than thirteen states are considering criminal codes that emphasize deserved punishment rather than rehabilitation." Considers the impact of this change in attitude.

Comparative criminal justice issues in the United States, West Germany, England and France; symposium. Maryland law review, v. 42, no. 1, 1983: 1-195.

The focus of this symposium is on sentencing in the four nations.

Conley, John A. Criminal justice history as a field of research: a review of the literature, 1960-1975. Journal of criminal justice, v. 5, spring 1977: 13-28.

Analyzes selected historical criminal justice texts and standard reference sources published during the past decade. Contends that "scholars in the United States have not investigated the historical roots of criminal justice and as a result the literature and curricula of criminal justice educational programs portray a narrow contemporary perspective."

CONtact, inc. Let the punishment fit the crime. Lincoln, Neb., 1978. 155 p.

"Presents an overview of the sentencing structure, beginning with the pertinent standards and goals promulgated by the National Advisory Commission on Criminal Justice Standards and Goals."

Council of State Governments. The handbook on interstate crime control (1978 edition). Lexington, Ky., 1978. 160 p. (Council of State Governments. RM-654)

Presents "copies of uniform laws and interstate compacts, the regulations called for thereunder, the legal forms for their proper enforcement, and other similar basic sources of information for ready reference by officials engaged in interstate crime control."

Criminal justice: law and politics. 3rd ed. North Scituate, Mass., Duxberry Press, c1980. 479 p.

This book is comprised of essays by a variety of authors on such aspects of the criminal justice system as the police, administration of justice, prosecution, defense attorneys, courts, corrections, and judicial reform.

Criminal process in the seventies. Law and contemporary problems, v. 41, winter 1977: whole issue.

Contents.--Reform of the Federal criminal laws: issues, tactics, and prospects, by L. Schwartz.--Reform of State criminal law and procedure, by B. George, Jr.--Pleading guilty: a critique of four models, by H. Uviller. --Current perspectives in corrections: a cacophony, by H. Miller.--Punishment and crime: a critique of current findings concerning the preventive effects of punishment, by P. Cook.--The uses of social science in trials with political and racial overtones: the trial of Joan Little, by J. McConahay, C. Mullin and J. Frederick.--Work release in North Carolina--a program that works! by A. Witte.--Specialization in criminal law, by M. Kahn and L. Kahn.

Criminal justice reform: a blueprint. Chicago, Published for Free Congress Research and Education Foundation by Regnery/Gateway, c1983. 273 p.

Contents.--Criminal justice reform: a blueprint, by R. Rader and P. McGuigan.--Combatting the American epidemic, by E. Meese, III.--The Freedom of Information Act: changes needed, by W. Webster.--Youth crime policies, by R. Woodson.--Drugs and crime: possibilities for reform, by P. Hawkins.-Gun control, crime and freedom, by D. Hardy.--The insanity defense: recommendations for reform, by E. Zorinsky.--Bailing out a failed law: the Constitution and pretrial detention, by R. Rader.--Excluding the exclusionary rule, by S. Schlesinger.--A proposal for habeas corpus reform, by W. Smith.-Pornography and the First Amendment, by B. Taylor.--Federal Tort Claims Act: possible reforms, by C. Grassley.--The forgotten victim, by P. Laxalt.--Restoring the victim of crime, by F. Carrington and L. Duggan. --Criminal character and mercy, by R. Kirk.--A look at the court watch concept, by D. Popeo.--Making criminal justice work, by W. Stanmeyer.

Deutsch, Stuart Jay, and Charles J. Malmborg. A comparison of sentencing strategies between States. Evaluation review, v. 5, June 1981: 307-324.

"A dynamic descriptive model of the criminal justice system is implemented for the states of Missouri and Texas. The differences between sentencing strategies, prison population movements, and criminal behavior patterns are examined. Results for optimization of sentencing strategy and estimates for separate incapacitative and deterrent effects are provided from the discrete time model in each state, and comparisons are offered."

Dubnoff, Caren. Pretrial publicity and due process in criminal proceedings. Political science quarterly, v. 92, spring 1977: 89-108.

"Examines the roles of the Supreme Court and state appellate courts in defining and upholding the constitutional right to an impartial criminal trial in the face of prejudicial pretrial publicity . . . [and] concludes that the Supreme Court refusal to declare national standards has led to widespread denial of judicial relief by most state courts."

Flanagan, Timothy, J., David J. VanAlstyne, and Michael R. Gottfredson, eds. Sourcebook of criminal justice statistics--1981. [Washington] U.S. Bureau of Justice Statistics, 1982. 614 p.

Partial contents.--Criminal justice system characteristics.--Public attitudes toward crime.--Nature of known offenses.--Persons arrested.--Judicial processing.--Correctional supervision.

Fort, Burke O'Hara, and others. Speedy trial: a selected bibliography and comparative analysis of state speedy trial provisions. Rockville, Md., National Criminal Justice Reference Service, 1978. 194 p.

This bibliography addresses such issues as "problems in the implementation of speedy trial acts; historical analysis of speedy trial acts; constitutional rights of a speedy trial; remedies for denial of the right to a speedy trial; discussions of conditions under which the speedy trial right is derived; the impacts of speedy trial provisions on existing court systems; speedy trial provisions and their effect on the quality of the judicial process; and pretrial rights and remedies."

Foster, Jack D., and David H. Ashley. Suggested State legislation on criminal justice standards and goals. Lexington, Ky., Council of State Governments [1976] 36 p.

Contents.--Plea Negotiations Act.--Diversion Program Act.--Private Security Licensing and Regulatory Act.

Gettinger, Stephen. Fixed sentencing becomes law in 3 States; other legislatures wary. Corrections magazine, v. 3, Sept. 1977: 16-26, 28-30, 33, 36.

Surveys the States which have adopted determinate sentencing, citing the variations in the laws and the effects they have on prison terms and prison populations.

Gillers, Stephen. Congress overhauls the laws. Nation, v. 222, Feb. 14, 1976: 172-177.

Reviews the legislative history and controversial provisions of S. 1, the proposed revision and codification of Federal criminal law.

Greenberg, David F., and Drew Humphries. The cooptation of fixed sentencing reform. Crime & delinquency, v. 26, Apr. 1980: 206-225.

"Criticism of indeterminate sentencing was initially advanced as part of a larger radical program to transform American society. Yet recent sentencing reform legislation legitimated by this criticism has taken on a conservative character. This development is documented . . . and explained in terms of political and social change over the past decade."

Gruhl, John. State supreme courts and the U.S. Supreme Court's post-Miranda rulings. Journal of criminal law & criminology, v. 72, fall 1981: 886-913.

Article concludes that State supreme courts have eroded the U.S. Supreme Court's Miranda principles, but no more than the Burger Court itself did in subsequent decisions allowing less-blatant violations. The author found generally that "the southern and midwestern courts were most prone to erode Miranda, while the western and eastern courts were least prone to do so."

----- The Supreme Court's post-Miranda rulings: impact on local prosecutors, by John Gruhl and Cassia Spohn. Law and policy quarterly, v. 3, Jan. 1981: 29-54.

"Beginning in 1971, the Burger Court issued a series of rulings which chipped away at the Miranda v. Arizona ruling. This article analyzes the impact of this series of rulings on prosecuting attorneys from counties with a population of 100,000 or more. The results indicate that prosecutors perceive that the Court has changed the degree with which police must comply with Miranda and that prosecutors approve of this, but that prosecutors are not more likely to prosecute in cases where police committed alleged violations than they had been before 1971. This seems due to the fact that prosecutors take their cues more from local courts, which reportedly require strict compliance with Miranda, than from the Supreme Court."

Hager, Barry M. Another chance for revising grand juries. Congressional quarterly weekly report, v. 35, May 7, 1977: 855-857.

"After years of hearings and debate, prospects in Congress for legislation revising the nation's grand jury system appear to be growing stronger. Charges of abuse of the system by the Justice Department and FBI have been widespread since 1970. Hearings first were conducted on the subject in 1973. Now they are being held again."

Hail, Jerome. Theory and reform of criminal law. Hastings law journal, v. 29, May 1978: 893-919.

Article analyzes the origins of criminal law and asserts that "the organization of the criminal law, expressing its contextual significance, and its foundation in a basic moral principle provide the general outline of the policy that should guide reform."

Hamer, John. Criminal release system. [Washington, Congressional Quarterly] 1976. 441-460 p. (Editorial research reports, 1976, v. 1, no. 23)

Partial contents.--Cases of 'revolving door' justice.--Evolvement of release procedures.--Proposals for changing the system.

Hofstadter, Sarah K. Protecting State procedural rights in Federal court: a new role for substantive due process. Stanford law review, v. 30, May 1978: 1019-1068.

Comment "proposes the exercise of federal jurisdiction to enforce state statutes giving procedural protection to criminal defendants beyond minimum constitutional requirements."

Inbau, Fred E., and Marvin E. Aspen. Criminal law for the layman; a guide for citizen and student. 1st ed. Philadelphia, Chilton Books Co., 1970. 190 p. (Inbau law enforcement series)

This book is divided into the following broad topics and discusses each in detail: crimes, legal process from arrest to appeal, criminal law administration, and citizen's duty and protection.

Kadish, Sanford H. Codifiers of the criminal law: Wechsler's predecessors. Columbia law review, v. 78, June 1978: 1098-1144.

Article examines the works of four 19th-century criminal law codifiers (Edward Livingston, Thomas Macaulay, James Stephen, and David Field) as predecessors of Herbert Wechsler's Model Penal Code.

Kagan, Robert A., and others. The evolution of State supreme courts. Michigan law review, v. 76, May 1978: 961-1005.

Article reports on a study of "how caseload size affected the structure and business of American state supreme courts from 1870-1970. . . . Examines the various means states used to control supreme court caseloads, the political problems involved, and the types of courts that have resulted. . . . Presents evidence that changes in court organization in response to caseload pressure are accompanied by changes in the kinds of cases state supreme courts hear, the style of their opinions, and the results of the cases."

Kennedy, Edward M., and John H.F. Shattuck. Pro & con: the Federal Criminal Code. Trial, v. 15, Oct. 1979: 24-27, 36, 74.

In these two articles which comprise a pro-and-con discussion of the proposed Federal Criminal Code, U.S. Senator Kennedy outlines the need for these needs, whereas the legislative director for the American Civil Liberties Union discusses his criticisms of the proposed code.

Ketcham, Orman W. National standards for juvenile justice. Virginia law review, v. 63, Mar. 1977: 201-219.

Article "considers six of the Standards' more important modifications in the philosophy, legal theory, and social goals of the juvenile court movement and ten significant new rights that the Standards accord to juveniles."

Knab, Karen Markle, ed. Courts of limited jurisdiction: a national survey. Washington [National Institute of Law Enforcement and Criminal Justice] for sale by the Supt. of Docs., G.P.O., 1977. 423 p.

"The National Survey of Courts of Limited Jurisdiction was conducted by the American Judicature Society, in cooperation with the American Judges Association, to document the existing organization of limited- and special-jurisdiction courts throughout the United States. The survey was designed to identify the courts in each state which would be defined as having limited or special jurisdiction, and to determine the qualifications of judicial personnel, the nature of staff support, whether uniform procedures were employed, the nature of court financing and the court's responsibility to comply with state judicial administration requirements."

Kovler, Peter. The saga of son of S. 1: how the Criminal Code reform bill passed the Senate. Civil liberties review, v. 5, Jan.-Feb. 1979: 10-18.

Describes negotiations within the Senate during the 95th Congress over the Criminal Code reform bill (S. 1437) and problems with civil liberties questions which prevented passage of the House counterpart. Expresses reservations that the sentencing provisions would result in possible infringements of civil liberties of Blacks and poor people particularly.

Lagoy, Stephen P., Frederick A. Hussey, and John H. Kramer. A comparative assessment of determinate sentencing in the four pioneer states. Crime & delinquency, v. 24, Oct. 1978: 385-400.

"Examining the nature of the determinate sentencing schemes in the four pioneer states, the authors compare and contrast the provisions for determinacy in each of the revised criminal codes, with the objective of informing legislators, planners, and practitioners about the variation possible within the apparently straightforward guidelines established by determinacy. Authors note vast differences between the states in the constraints on judges regarding the decision about whether to incarcerate, in the delimination of judicial discretion in sentencing, in the specificity of aggravating and mitigating factors, in the institutional use of good time, in the range of possible penalties, and in the degree to which determinate sentencing as practiced can look like indeterminate sentencing."

LaPeria, Susan S., David M. Horton, and Marjorie Kravitz. Criminal justice periodicals: a selected bibliography. Washington [National Institute of Law Enforcement and Criminal Justice] for sale by the Supt. of Docs., G.P.O., 1979. 71 p.

"Selections are organized into eight thematic areas: Corrections and Penology, Courts, Criminology Justice System, Criminal Law, Criminology, Forensics, Juvenile Justice, and Law Enforcement."

Loewy, Arnold H. Criminal law in a nutshell. St. Paul, West Pub. Co., 1975. 302 p. (Nutshell series)

Provides an introduction and compact review of criminal law.

Maloney, John C., and Frank B. Raymond. A standardized presentence report: one State's response. Federal probation, v. 41, June 1977: 40-42.

"In spite of the advantages of and need for standardized presentence reports, many states have been frustrated in their attempts because of conflicting demands from judges, individual styles of investigating officers, and fragmented probation systems. The authors relate how the Carolina Probation, Parole and Pardon Board dealt successfully with such problems and was able to develop, implement, and evaluate a high quality standardized presentence report."

McDonald, Lawrence P. The Criminal Code Reform Act is a statutory mousetrap. Review of the news, v. 18, Mar. 3, 1982: 39-41, 43-44.

Lists "grave flaws" in S. 1630, the proposed omnibus reform of Federal criminal laws, that are seen as contrary to the beliefs and interests of conservatives.

Moore, Merlyn D. A "normative" model for law enforcement in the criminal justice system. Journal of police science and administration, v. 4, Mar. 1976: 71-81.

Analyzes the criminal justice system in systematic terms concentrating on its input, mechanism, and output.

Nagel, Stuart, and Martin Neef. Improving the criminal justice process. Current history, v. 71, July-Aug. 1976: 6-9, 32, 36.

"An important problem in improving the criminal justice process is how to allocate the scarce resources of the criminal justice system, including personnel, effort and, especially, budget dollars."

National Conference of Commissioners on Uniform State Laws. Uniform Law Commissioners' Model Sentencing and Corrections Act. Washington [National Institute of Law Enforcement and Criminal Justice] for sale by the Supt. of Docs., G.P.O., 1979. 447 p.

Proposed model act is divided into six articles. "Article 1 contains general provisions including definitions and rule-making procedures. Article 2 establishes the organization of the Department of Corrections. . . . Article 3 deals with sentencing. The Article establishes the fundamental policies behind sentencing criminal defendants and the procedures for doing so. . . . Article 4 contains provisions directly related to the treatment of sentenced persons. The Article articulates the protected interests of confined persons as well as requiring the establishment of grievance procedure. . . . Article 5 established a program for assisting the victims of criminal offenses. Article 6 provides for the effective date of the Act and governs the transition from prior law to the provisions of the Act."

Neithercutt, M.G. Parole legislation. Federal probation, v. 42, Mar. 1977: 22-26.

Analyzes developments in the areas of determinate sentencing and parole utility. Includes summaries of various state bills/laws on these issues.

Noam, Eli. Case quotas in the court: an analysis of the allocation of judicial resources. Journal of research in crime and delinquency, v. 19, July 1982: 204-215.

"The paper develops analytic criteria for the selection of the optimal 'mix' of trials in a congested court system. It describes a model generating case quotas for major categories of crime that maximizes the reduction in the overall social losses due to crime. The empirical results for the District of Columbia suggest that scarce court time should be heavily allocated to trials for robbery and burglary."

Perlman, Harvey S., and Josephine R. Potuto. The Uniform Law Commissioners' Model Sentencing and Corrections Act: an overview. Nebraska law review, v. 58, no. 4, 1979: 925-964.

Article "discusses the major policy decisions which serve as the foundation for the provisions of the Act. . . . Several of the major themes of the Act are discussed with some examples of how these themes were incorporated into the statutory provisions."

Phillips, Llad. The criminal justice system: its technology and inefficiencies. Journal of legal studies, v. 10, June 1981: 363-380.

Uses mathematical models to investigate "optimal distribution of resources among branches of the criminal justice system such as police, courts (plus prosecution), and corrections; and optimal allocation of resources to the system." Finds a lack of coordination between branches of the criminal justice system and excessive costs, particularly in larger States.

Potter, William C., II. The United States Sentencing Commission: a constitutional delegation of congressional power. Indiana law journal, v. 55, fall 1979: 117-137.

Comment discusses how the Commission of Sentencing proposed in the Federal Criminal Code revision legislation will "address the problem of sentencing disparity." Presents philosophical and theoretical premises for the commission and outlines "the suggested organizational structure of the Commission."

Prassel, Frank R. Criminal law, justice, and society. Santa Monica, Calif., Goodyear Pub. Co., c1979. 410 p.

This book explains the role of law as a means of social control, traces the development of different legal systems, discusses the major types and causes of crime, analyzes the phases of the criminal justice system, and considers other topics related to criminal law.

Rogers, Tommy W. Redesigning the criminal justice system: a commentary on selected potential strategies. Federal probation, v. 46, Mar. 1982: 49-54.

"Suggestions are made concerning modification of the criminal law detection and apprehension strategies, improving the administrative and judicial efficiency of courts, redressing system neglect of victims, and utilization of research in planning and legislation."

Rubin, Rick J. Interjurisdictional merger of sentences: the need for an interstate compact. Colorado law review, v. 49, summer 1978: 473-491.

Comment proposes an interstate compact to eliminate inadequacies of the present practice of concurrent sentencing of multijurisdictional offenders by individual States.

Rubin, Sol. New sentencing proposals and laws in the 1970's. Federal probation, v. 43, June 1979: 3-8.

"Not since the proliferation of indeterminate sentencing laws started about 60 years ago in the United States has there been introduced as striking a change in sentencing legislation and philosophical views as has come on the scene within the last few years. Briefly put, the acts and philosophical statements support the repeal of the indeterminate sentence and the abolition, or near abolition, of parole."

Sandercock, Margaret. What rights does an imprisoned person have before trial? According to the Supreme Court, about the same rights as someone found guilty. Human rights, v. 9, fall 1980: 40-43, 53-56.

Article holds that the Supreme Court's decision in Bell v. Wolfish (1979) "set back a decade of judicial activism on the issue of pretrial detention. In light of Bell v. Wolfish, it has become difficult for groups working for social change in the area of prisoners' rights to use the courts to further the rights of pretrial detainees."

Schwartz, Louis B. Reform of the Federal criminal laws: issues, tactics and prospects. Duke law journal, v. 1977, Mar. 1977: 171-230.

Article contrasts three proposals for the reform and codification of U.S. criminal law and examines the differences set forth in each proposal. The first attempt was presented in the recommendations in the "Final Report" of the National Commission on Reform of Federal Criminal Laws (Brown Commission). The second version was the bill introduced in the 93rd and 94th Congresses as S. 1. The third version was that of the National Committee Against Repressive Legislation and the American Civil Liberties Union, which was not presented as an alternative reform, but rather "it concentrated on a campaign to stop S. 1."

Smith, Richard A., and Richard E. Klosterman. Criminal justice planning: an alternative model. Criminology, v. 17, Feb. 1980: 403-418.

Suggests an alternative model of criminal justice planning which deals with the lack of criminal justice knowledge, the difficulty of defining goals and priorities, and the need for timely and relevant information.

Symposium on the policies and legal theories underlying the proposed Federal Criminal Code. Journal of criminal law and criminology, v. 72, summer 1981: 381-636.

Contents.--Foreword: evaluating a proposed criminal code, by A. Dershowitz.--Extraterritorial jurisdiction and the proposed Federal Criminal Code, by K. Feinberg.--Criminal liability for life-endangering corporate conduct, by W. Spurgeon and T. Fagan.--Competency to stand trial under the Senate and House proposed revisions of the Federal Criminal Code, by L. Romero.--Some thoughts on the culpability provisions of the proposed Federal Criminal Code, by D. Robinson, Jr.--Sentence decisionmaking: the logic of sentence decisions and the extent and sources of sentence disparity, by K. Clancy, and others--A practical look at the sentencing provisions of S. 1722, by G. Tjoflat.--A legal bibliography on the proposed Federal Criminal Code.

Thatcher, Gary. Justice in America: making it work. Christian Science monitor, Nov. 27, 1978: 1, 12-13; Nov. 28: 14-15; Nov. 29: 14-15; Nov. 30: 12-13; Dec. 1: 14-15.

Five-part series examines changes in the American criminal justice system since the Christian Science Monitor published its series, "Crisis in the Courts," ten years ago. Argues that "people are questioning the whole adversary system." The reporter notes that he saw "all-too-familiar signs of sloth and ineptitude--bailiffs lazing around idle courtrooms, clerks and spectators falling asleep as judges droned on in numbing legalese, and bewildered citizens buffeted about by 'the system' that, at least in theory, is designed to serve them." Notes also the emergence of alternatives to the courts ("new forums to settle disputes, usually without judges and often without lawyers"), which the reporter termed as "hopeful."

Tonry, Michael H. Real offense sentencing: the Model Sentencing and Corrections Act. Journal of criminal law & criminology, v. 72, winter 1981: 1550-1596.

"The Uniform Law Commissioners recently adopted a Model Sentencing and Corrections Act. It provides for the creation of a sentencing commission that would promulgate guidelines for sentencing. In the ordinary case, the judge would be expected to impose the sentence indicated by the applicable guideline. Defendants would be entitled to appeal the sentence imposed. To forestall or frustrate prosecutorial manipulation of the guidelines by means of charge dismissals and plea bargains, the Model Act separates sanctions from the substantive criminal law by directing the probation officer, the judge, and any appellate court to base sentencing considerations not on the offense of conviction but on the defendant's 'actual offense behavior.'"

U.S. Congress. House. Committee on the Judiciary. Criminal Code Revision Act of 1980; report together with additional, separate, supplemental, and dissenting views to accompany H.R. 6915, including cost estimate of the Congressional Budget Office. Washington, G.P.O., 1980. 758 p. (Report, House, 96th Congress, 2nd session, no. 96-1396)

----- Federal Court Reform Act of 1982; report to accompany H.R. 6872 which, on July 27, 1982, was referred jointly to the Committee on the Judiciary and the Committee on Education and Labor including cost estimate of the Congressional Budget Office. Washington, G.P.O., 1982. 93 p. (Report, House, 97th Congress, 2nd session, no. 97-824, part 1)

----- Outline of provisions of title I of H.R. 6915, "Criminal Code Revision Act of 1980." Washington, G.P.O., 1980. 102 p.

At head of title: 96th Cong., 2d sess. Committee print.

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Criminal Justice. Revision of the Federal Criminal Code. Hearings, 96th Cong., 1st sess. Washington, G.P.O., 1981-1982. 6 v. (5579 p.).

Hearings held Feb. 14-Oct. 25, 1979.

"Serial no. 80"

U.S. Congress. House. Committee on Science and Technology. Subcommittee on Domestic and International Scientific Planning, Analysis and Cooperation. Research into criminal sentencing. Hearings, 95th Cong., 2d sess. May 16-17, 1978. Washington, G.P.O., 1978. 190 p.
"No. 83"

U.S. Congress. Senate. Committee on the Judiciary. The Bail Reform Act of 1981; report on S. 1554 together with additional views. Washington, G.P.O., 1982. 94 p. (Report, Senate, 97th Congress, 2nd session, no. 97-317)

----- Criminal Code Reform Act of 1981; report to accompany S. 1630. Washington, G.P.O., 1981. 1569 p. (Report, Senate, 97th Congress, 2nd session, no. 97-307)

----- Reform of the Federal criminal laws. Hearings, 92nd Cong., 1st sess.-97th Cong., 1st sess. Washington, G.P.O., 1971-1981. 16 v. (12,896 p.)
Hearings held Feb. 10, 1971-Oct. 1, 1981.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on the Constitution. Bail reform. Hearings, 97th Cong., 1st sess., on S. 440, S. 482, S. 1253, S. 1554. Washington, G.P.O., 1982. 829 p.
Hearings held Sept. 17 and Oct. 21, 1981.
"Serial no. J-97-56"

U.S. General Accounting Office. States are funding juvenile justice projects that conform to legislative objectives; report to the Subcommittee on State, Justice, Commerce, the Judiciary and Related Agencies, Committee on Appropriations, United States Senate, by the Comptroller General. [Washington] 1980. 129 p.
"GGD-80-40, Mar. 7, 1980"
Report "discusses the uses made of funds provided by the Juvenile Justice and Delinquency Prevention Act in seven States. It also contains . . . [GAO] comments on each of the 80 projects . . . visited during [the review]."

Vinter, Robert D. Trends in State correction: juveniles and the violent young offender. Crime & delinquency, v. 25, Apr. 1979: 145-161.
Documents "trends and patterns in correction across the fifty states that are of significance for young offenders, discussing their implications for those who commit crimes of violence, and . . . presents insights into how correctional policies are implemented or thwarted by juvenile justice conditions among the states."

Walker, Nigel. Sentencing in a rational society. 1st American ed. New York, Basic Books, 1971, c1969. 239 p.
Examines such issues as the aims of the penal system, scope of criminal law, techniques for crime reduction, and sentencing reform.

Wilkins, Leslie T. The principles of guidelines for sentencing: methodological and philosophical issues in their development. Washington, National Institute of Justice, for sale by the Supt. of Docs., G.P.O., 1981. 79 p.
Partial contents.--What are guidelines for sentencing?--The probable use of guidelines.--Decisions and their environments.--When is a sentence a "wrong" sentence?--The beginnings of guidelines.--Transition from parole to sentencing.--The research rationale.--Organization and management of cooperative research.--Ethical issues in the research design.--Methodological issues in the development of sentencing guidelines.--Outstanding issues in sentencing research.

----- Sentencing guidelines: structuring judicial discretion; final report of the feasibility study, by Leslie T. Wilkins and others. [Washington, National Institute of Law Enforcement and Criminal Justice] 1976. 175 p.
Results of a two-year study indicate that "judges have within their capabilities today the means by which they may sharply curtail, if not virtually eradicate, sentencing disparities in most American jurisdictions."

Zalman, Marvin. A commission model of sentencing. Notre Dame lawyer, v. 53, Dec. 1977: 266-290.

Article supports a legislative proposal for a model commission on sentencing. Examines the problems of sentencing, which include "irrationality, disparity, ineffectiveness, and diffusion" and illustrates how this proposed commission may help solve some of these problems.

A GUIDE TO INFORMATION SOURCES ON THE 1983-1984 HIGH SCHOOL DEBATE TOPIC

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INTRODUCTION

This research guide identifies sources of information about the U.S. justice system and related topics which will be discussed by high school debaters. The guide describes indexes and other research tools, and provides appropriate search terms that may be used when consulting these tools.

This research guide is constructed to permit a researcher to select the scope and types of information to be included in a particular research project. The research guide identifies the printed indexes, online data bases, and other research tools variously available in high school, college, public, and research libraries. Some sources are provided for tracking legislation and legislative information.

Search terms, which may be used separately or in combination, are provided for each resolution of the debate topic.

> That the United States should adopt uniform rules governing the criminal investigation procedure of all public law enforcement agencies in the Nation.
> (CRIMINAL INVESTIGATION)
>
> That the United States should establish uniform rules governing the procedure of all civil courts in the Nation.
> (CIVIL COURTS)
>
> That the United States should establish uniform rules governing the procedure of all criminal courts in the Nation.
> (CRIMINAL COURTS)

Throughout the guide, the resolutions will be referred to in the abbreviated form listed in parenthesis above.

While the focus of this research guide is on the location of literature and legislative information on the debate topic and resolutions available in general libraries, there are also several sources of case materials including legal data bases (LEXIS, WESTLAW, and JURIS) and the national, state, and regional reporter systems, which may be consulted and which are available in law libraries.

BOOKS

Library of Congress subject headings are used in many library catalogs nationwide. This partial listing of subject headings may be used to identify books on the debate topic. Under each heading individual states as well as the United States as a whole may be searched.

GENERAL

- Court congestion and delay
- Courts
- Crime and criminals
- Criminal justice, Administration of
- Criminal statistics
- Criminology
- Judges
- Judicial power
- Judicial process
- Jurisdiction
- Justice, Administration of
- Juvenile courts
- Juvenile justice, Administration of
- Law enforcement
- Law reform
- Rehabilitation of criminals
- Uniform state laws

CRIMINAL INVESTIGATION

- Crime and criminals--Identification
- Criminal investigation
- Entrapment (Criminal law)
- Legal documents--Identification
- Police administration
- Police questioning
- Undercover operations

CIVIL COURTS

- Civil law
- Civil procedure
- Class actions (Civil procedure)
- Court rules
- Parties to actions

CRIMINAL COURTS

- Court rules
- Criminal courts
- Criminal jurisdiction
- Criminal law
- Criminal procedure
- Exclusionary rule (Evidence)
- Indeterminate sentence
- Limitation of actions (Criminal law)
- Perjury
- Pleas (Criminal procedure)
- Sentences (Criminal procedure)
- Speedy trial

JOURNAL ARTICLES

PRINTED INDEXES

Citations to journal articles and other materials about the debate topic can be found in a number of printed indexes. The materials covered by printed indexes are briefly described here. Search terms covering the resolutions of the debate topic are included.

In addition to the printed indexes described in this section, several specialized indexing and abstracting services are also available. These include: CRIMINAL JUSTICE ABSTRACTS, CRIMINAL JUSTICE PERIODICAL INDEX, CRIME AND DELINQUENCY LITERATURE, POLICE SCIENCE ABSTRACTS, CRIMINOLOGY AND PENOLOGY ABSTRACTS, and CRIME AND DELINQUENCY PROJECTS--AN INTERNATIONAL BIBLIOGRAPHY.

CURRENT LAW INDEX

Current Law Index covers over 660 law periodicals selected by an advisory board of the American Association of Law Libraries. It is published in 8 monthly issues, 3 quarterly cumulations and a single annual cumulation.

GENERAL

- Appellate courts
- Appellate procedure
- Constitutional law
- County courts
- Court congestion and delay
- Courts
- Crime and criminals
- Criminal justice
- Judges
- Judgments
- Judicial power
- Judicial review
- Jurisdiction
- Justice, Administration of
- Juvenile courts
- Juvenile justice, Administration of
- Rehabilitating criminals
- Uniform state laws

CRIMINAL INVESTIGATION

- Confession (Law)
- Crime laboratories
- Criminal intent
- Criminal investigation
- Detectives
- Eavesdropping
- Electronics in criminal investigation
- Indictments
- Informers
- Searches and seizures
- Source questioning

CIVIL COURTS

- Actions and defenses
- Civil law
- Civil law systems
- Civil procedure
- Class actions (Civil procedure)
- Equity pleading and practice
- Small claims courts

CRIMINAL COURTS

- Criminal courts
- Criminal law
- Criminal procedure
- Defense (Criminal procedure)
- Evidence
- Extradition
- Grand jury
- Habeas corpus
- Indeterminate sentence
- Judgments, Criminal
- Jury
- Pleading (Criminal procedure)
- Pleas (Criminal procedure)
- Preliminary examinations (Criminal procedure)
- Sentences (Criminal procedure)
- Speedy trial

INDEX TO LEGAL PERIODICALS

The Index to Legal Periodicals is a subject and author index to legal articles, yearbooks, institutes, and reviews of works published in the U.S., Canada, Great Britain, Ireland, Australia, and New Zealand. The Index is published monthly, except September, with a bound cumulation each year.

GENERAL

- Administration of justice
- Appellate procedure
- Courts
- Criminal statistics
- Judges
- Judicial review
- Judicial statistics
- Jurisdiction
- Juvenile courts
- Magistrates and magistrates' courts
- Municipal courts
- Uniform laws

CRIMINAL INVESTIGATION

- Arrest
- Criminal investigation
- Criminal responsibility
- Criminology
- Eavesdropping
- Entrapment
- Identification
- Indictment and information
- Law enforcement
- Lie detectors and detection
- Pardon
- Parole
- Police
- Prisons and prisoners
- Probation
- Rehabiliation of criminals
- Self-incrimination

CIVIL COURTS

- Actions and defenses
- Civil law
- Civil procedure
- Class actions
- Federal rules of civil procedure
- Parties to action
- Small claims courts

CRIMINAL COURTS

- Administration of criminal justice
- Bail
- Criminal law
- Evidence
- Federal rules of criminal procedure
- Grand jury
- Juries
- Plea bargaining
- Sentencing
- Speedy trial

LEGAL RESOURCE INDEX (MICROFILM)

Legal Resource Index includes over 600 law journals, six legal newspapers and relevant materials from the Library of Congress collection, Magazine Index, and National Newspaper Index. The Index is arranged in four separate sections: subject, author/title, table of cases, and table of statutes. When the Index is supplemented, a new cumulative microfilm is provided.

GENERAL

Appellate courts
Appellate procedure
Correctional law
County courts
Court administration
Court congestion and delay
Courts
Crimes and criminals
Criminal justice, Administration of
Judges
Judge-made law
Judicial power
Judicial process
Judicial review
Jurisdiction
Justice, Administration of
Juvenile courts
Juvenile justice, Administration of
Law enforcement
Parole probation
Prison administration
Rehabilitation of criminals
Uniform state laws

CRIMINAL INVESTIGATION

Crime and criminals--Identification
Criminal investigation
Electronics in criminal investigation
Forensic ballistics
Informers
Legal documents--Identification
Lie detectors and detection
Police patrol
Police questioning
Private prosecutors
Probation
Prosecution
Searches and seizures

CIVIL COURTS

Actions and defenses
Civil law
Civil law systems
Civil procedure
Class actions (Civil procedure)
Intervention (Civil procedure)
Judgments
Small claims courts

CRIMINAL COURTS

Criminal courts
Criminal jurisdiction
Criminal procedure
Defense (Criminal procedure)
Evidence, Criminal
Judgments, Criminal
Jury
Grand jury
Habeas corpus
Indeterminate sentence
Instructions to juries
Motions (Law)
Pleading (Criminal procedure)
Pleas (Criminal procedure)
Preliminary examinations (Criminal procedure)
Sentences (Criminal procedure)
Speedy trial
Summary proceedings

MAGAZINE INDEX (MICROFILM)

Magazine Index provides citations from over 370 popular magazines, focusing on coverage of current affairs, and general interest topics. The Index is divided into author and subject sections.

GENERAL

Appellate courts
Appellate procedure
Correctional psychology
Corrections
Court congestion and delay
Courts
Crime and criminals
Crime and the press
Criminal justice,
  Administration of
Criminologists
Discovery (Law)
Judges
Judicial power
Judicial review
Jurisdiction
Jurisprudence
Justice, Administration of
Juvenile courts
Juvenile justice,
  Administration of
Pardon
Parole
Prisons
Probation
Rehabilitation of criminals
Sociological jurisprudence

CRIMINAL INVESTIGATION

Crime and criminals--
  Investigation
Crime laboratories
Criminal investigation
Criminal liability
Detectors
Eavesdropping
Electronics in criminal
  investigation
Hypnotism and crime
Informers
Lie detectors and detection
Parapsychology and criminal
  investigation
Photography, Legal
Police charges
Police questioning
Private prosecutors
Psychology, Forensic
Prosecution
Public prosecutors

CIVIL COURTS

Arbitration and award
Actions and defenses
Civil law
Civil procedure
Class actions (Civil
  procedure)
Small claims courts

CRIMINAL COURTS

Bail
Criminal courts
Criminal jurisdiction
Criminal procedure
Criminal registers
Defense (Criminal
  procedure)
Evidence, Criminal
Extradition
Grand jury
Imprisonment
Indeterminate sentence
Instructions to juries
Jury
Pleas (Criminal
  procedure)
Preliminary examinations
  (Criminal procedure)
Sentences (Criminal
  procedure)
Speedy trial
Venue

PUBLIC AFFAIRS INFORMATION SERVICE BULLETIN (PAIS)

PAIS is a subject index of books, pamphlets, government publications, reports of public and private agencies, and periodical articles relating to economic and social conditions, public administration, and other topics.

GENERAL

- Circuit courts
- Correction (Penology)
- Courts
- Crime and criminals
- Criminal justice
- Criminal research
- Due process of law
- Judges
- Judge-made law
- Judicial power
- Judicial review
- Jurisdiction
- Justice, Administration of
- Juvenile courts
- Juvenile delinquents
- Juvenile justice
- Legal procedure
- Legislation--Uniformity
- Sociological jurisprudence
- Trials
- United States--Justice Department
- United States President--Relations with the judiciary

CRIMINAL INVESTIGATION

- Criminal investigation
- Detectives
- Electronics in criminal investigation, espionage, etc.
- Entrapment
- Evidence
- Informers (Law)
- Law enforcement
- Lie detectors
- Prisoners
- Prisons
- Probation
- Searches and seizures
- Television in police work
- Undercover operations

CIVIL COURTS

- Civil procedure
- Class actions

CRIMINAL COURTS

- Criminal justice
- Criminal law
- Criminal procedure
- Defense (Criminal procedure)
- Extradition
- Grand jury
- Habeas corpus
- Juries
- Pleas (Criminal procedure)
- Recidivists
- Sentences (Law)

READERS' GUIDE TO PERIODICAL LITERATURE

The Reader's Guide is an author/subject index to periodicals of general interest published in the U.S.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Courts	Confession (Law)	Small claims courts	Bail
Judgments	Crime and criminals		Criminal law
Judges	Crime and the press		Criminal justice, Administration of
Judicial power	Criminal investigation		Grand jury
Judicial review	Criminal psychology		Jury
Justice, Administration of	Detectives		Pleas (Legal procedure)
Juvenile courts	Fingerprints		Punishment
Juvenile delinquents and delinquency	Forensic microanalysis		
Juvenile justice, Administation of	Hypnotism--Police use		
Lawyers	Informers		
Legal procedure	Law enforcement		
Legislation	Lie detectors and detection		
Process (Law)	Pardon		
Trials	Parole		
United States--Justice, Department of	Police questioning		
United States--Supreme Court	Police, Surveillance operations		
	Prisons		
	Prison administration		
	Public prosecutors		
	Searches and seizures		
	Special prosecutors		

SOCIAL SCIENCES INDEX

The Social Sciences Index is a cumulative index to English language periodicals in the fields of law and criminology, political science, public administration, sociology, and other social science subjects. The Index is published quarterly with a bound cumulation issued each year.

GENERAL

Alternative dispute resolution programs
Appellate courts
Appellate procedure
Correctional law
Corrections research
Courts
Crime and criminals
Criminal jurisdiction
Criminal justice, Administration of
Criminal psychology
Criminal statistics
Criminology
Judgments
Judges
Judicial power
Judicial review
Justice, Administration of
Juvenile court procedure
Juvenile delinquency
Juvenile justice, Administration of
Parole
Police
Prisons
Probation
Uniform crime reports

CRIMINAL INVESTIGATION

Arrest
Crime and criminals--Identification
Crime laboratories
Criminal investigation
Eavesdropping
Evidence, Criminal
Fingerprints
Indictments
Photography in criminal investigation
Police--Intelligence units
Police--Surveillance operations
Police questioning
Public prosecutors
Prosecution
Searches and seizures
Telephone in criminal investigation
Typewriting--Identification
Writing--Identification

CIVIL COURTS

Actions and defenses
Civil procedure
Video tapes in civil procedure

CRIMINAL COURTS

Admissibility of evidence
Criminal law
Criminal procedure
Defense (Criminal procedure)
Federal rules of civil procedure
Indeterminate sentences
Jury
Mandatory sentences
Recidivists
Sentences (Criminal procedure)

ONLINE BIBLIOGRAPHIC DATA BASES

Online bibliographic data bases enable the researcher to locate citations to journal articles and other materials quickly by using a computer terminal to search a machine-readable file. Online data bases allow the researcher to combine search terms in ways that are impossible in a printed index or library catalog and to simultaneously search material that would be contained in printed index volumes covering several years. Data bases with text searching capabilities allow the researcher to use search terms in addition to the controlled searching vocabulary.

PUBLIC AFFAIRS INFORMATION SERVICE (PAIS), MAGAZINE INDEX, and LEGAL RESOURCE INDEX are available online as part of the Lockheed data base system. Brief descriptions of the contents of these data base files appear in the section on printed indexes.

NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (NCJRS) data base represents the document collection of NCJRS, an international information clearinghouse which is sponsored by the Natonal Institute of Justice under the Justice System Improvement Act of 1979. The data base consists of information about criminal justice, juvenile justice, and law enforcement and includes books, dissertations, theoretical and empirical studies, handbooks, journal articles and audiovisual materials. Indexing for the collection is based on subject terms from the National Criminal Justice Thesaurus. This file is available online as part of the Lockheed data base system.

SELECTED PERIODICALS

The periodicals listed below sometimes contain articles related to the debate resolution topics. It should be noted, also, that law journals or law reviews published by law schools may be a source of information on the debate topic. The titles are too numerous to include here, but the Index to Legal Periodicals, Cumulative Law Index, and Legal Resource Index include extensive listings of the law journals which they index. In addition, various sections of the American Bar Association, specialized bar organizations and state and local bar associations publish journals which may be of research value for the debate project.

GENERAL

- American Bar Association journal
- American journal of corrections
- American lawyer
- Crime and delinquency
- Crime and justice
- Crime and social justice
- Criminal justice and behavior
- Criminal justice review
- Criminal law bulletin
- Criminology
- Federal probation
- Issues in criminology
- Journal of criminal law, criminology and police science
- Journal of research in crime and delinquency
- Judicature
- Justice system journal
- Juvenile and family court journal
- Juvenile justice
- Law and contemporary problems
- Law and psychology review
- Law and society review
- Legal times
- National law journal
- Prison journal
- Probation journal
- State court journal
- Trial

CRIMINAL INVESTIGATION

- American journal of police
- FBI law enforcement bulletin
- Journal of crime and justice
- Journal of police science and administration
- Law and order
- Police and security bulletin
- Police chief
- Police law quarterly
- Police magazine

CIVIL COURTS

- American journal of trial advocacy
- Litigation
- Litigation news
- Review of litgation
- Trial lawyers quarterly

CRIMINAL COURTS

- American criminal law review
- American journal of criminal law
- Criminal justice journal
- Criminal justice news
- Criminal justice quarterly
- Criminal justice review
- Criminal law bulletin
- Criminal law review
- Criminal law quarterly
- Journal of criminal justice
- National journal of criminal defense

LEGISLATIVE INFORMATION

Congressional activities on the debate issues may be monitored by searching the following printed publications:

CONGRESSIONAL RECORD

The Congressional Record provides an edited transcript of the activities on the floor of the House and the Senate. It is published each day Congress is in session. Subject and name indexes are published biweekly and cumulated annually.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Courts	Crime and criminals	Courts	Courts
Crime and criminals	Law enforcement officers		Crime and criminals
Lawyers			
Supreme Court			

CONGRESSIONAL QUARTERLY WEEKLY REPORT

Congressional Quarterly Weekly Report provides current information on congressional activities, the progress of major bills, and background information on major policy issues. Important recent articles are indexed on the back cover of each issue. Consult this index under the heading "Law enforcement/Judiciary." A quarterly and an annual index are also issued. Congressional Quarterly also publishes an annual publication which cumulates material appearing in the weekly reports during a year. This publication is entitled CQ Almanac.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Courts	Crime and criminal justice	Law and justice	Crime and criminal justice
Courts of appeals, U.S.			
Dictrict courts, U.S.			
Judiciary			
Justice Department			
Law and justice			
Law profession and law practice			
Supreme Court			
Trial procedure			

NATIONAL JOURNAL

National Journal provides information on important executive branch and congressional actions. The weekly reports tend to address fewer issues but in greater depth than Congressional Quarterly Weekly Report. Annual indexes for subjects, personal names, government organizations, and private organizations are available for National Journal. The back cover of each issue of the Journal also contains a brief index to recent articles. Consult this index under the heading "Law and justice." Also "Law and justice" is the appropriate subject index term to use for searching the annual index. Organizations indexed include the American Bar Association, and the American Judges Association, among others.

LEGISLATIVE INFORMATION--BILLS AND RESOLUTIONS

PRINTED INDEXES

CONGRESSIONAL INDEX

The Congressional Index, published by the Commerce Clearing House, is a weekly looseleaf service which provides content and status information for bills and resolutions pending in Congress. The progress of the bills and resolutions is reported from the introduction of the legislation to final disposition.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Corrections and correctional facilities Courts, judges and lawyers	Crimes and crime prevention	Civil actions and procedures	Criminal actions and procedures

MAJOR LEGISLATION OF THE CONGRESS (MLC)

The MLC provides summaries of selected major legislation arranged by subject. It includes background on the issues and information on the content and status of major bills affecting that issue. The MLC may be purchased from the Government Printing Office or consulted at a Government depository library. Materials on the debate issues are indexed under the headings of LAW, CRIME, and JUSTICE.

DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS

The Digest summarizes the essential features of public bills and resolutions and changes made in them during the legislative process. The Digest is compiled by the Congressional Research Service and published during each session of Congress in two cumulative issues and a final issue at the conclusion of the session. The Digest is available for sale by the Government Printing Office. The Digest has sponsor/cosponsor, identical bills, short title, and subject indexes.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Corrections and correctional institutions Courts and civil procedure Crimes and crime prevention Department of Justice Lawyers and legal services	Crimes and crime prevention Law enforcement and police	Courts and civil procedure	Criminal procedure and sentencing

There are subdivisions within each of the broad subject areas.

CONGRESSIONAL RECORD

Bills and resolutions are often printed in the Congressional Record, along with explanatory materials, as they are introduced. A fuller explanation of this tool appears at the beginning of the section on Legislative Information.

LEGISLATIVE INFORMATION--CONGRESSIONAL PUBLICATIONS

Copies of recently issued hearings and committee prints should be requested directly from the issuing committee. Congressional hearings and committee prints may also be found in the collections of Government depository libraries.

PRINTED INDEXES

CIS INDEX (Index to the Publications of the United States Congress)

The CIS Index, produced by the Congressional Information Service, abstracts all congressional publications with the exception of the Congressional Record. It covers hearings, committee prints, House and Senate reports, documents, and public laws. The Index is published monthly and cumulated quarterly and annually. Each issue is divided into index and abstract portions. Appropriate search terms for this index are listed below.

CIS also publishes a Legislative History Service and the U.S. Congressional Committee Prints Index through 1969.

GENERAL

- Administration of justice
- Administrative Office of the U.S. Courts
- Court congestion and delay
- Court reorganization
- Courts
- Crime and criminals
- Department of Justice
- Federal circuit courts
- Federal district courts
- Judges
- Judicial Conference of the U.S. Courts
- Judicial powers
- Judicial reform
- Jurisdiction
- Law enforcement
- Parole and probation
- Trials
- Speedy trial
- Supreme Court

CRIMINAL INVESTIGATION

- Police
- Searches and seizures

CIVIL COURTS

- Civil procedure
- Judgments, Civil procedure

CRIMINAL COURTS

- Arrest
- Bail
- Criminal procedure
- Evidence
- Habeas corpus
- Juries
- Plea bargaining
- Pretrial diversion programs
- Sentences, criminal procedure

MONTHLY CATALOG OF UNITED STATES GOVERNMENT PUBLICATIONS

The *Monthly Catalog* lists documents issued by all branches of the Federal Government, including Congress. The *Monthly Catalog* indexes and abstracts congressional publications in less detail than the *CIS Index*. Appropriate search terms are listed in the section of this guide on Government Publications.

ONLINE BIBLIOGRAPHIC DATA BASES

CIS INDEX

The *CIS Index* is available in the Lockheed and SDC data base systems.

NEWSPAPER ARTICLES

PRINTED INDEXES

NEW YORK TIMES INDEX

The *New York Times Index* provides extensive abstracts for articles appearing in the *New York Times*.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Courts	Arrest without warrant	Courts	Courts
Crimes and criminals	Lie detectors		Crime and criminals
Criminology	Police		Supt Ct (U.S.)
Judges	Search and seizure		
Legal profession	Wiretapping		
Prisons			
Supt Ct (U.S.)			

BELL & HOWELL NEWSPAPER INDEXES

The Bell & Howell Newspaper Indexes lists articles appearing in the Chicago Tribune, Chicago Sun-Times, Denver Post, Houston Post, Los Angeles Times, New Orleans Times-Picayune, San Francisco Chronicle, and Washington Post.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Courts of law	Crime	Courts of law	Criminal law
Crime	Criminals		Grand jury
Criminals	Law enforcement		Juries
Due process of law	Police		
Judges			
Justice (Administration of)			
Juvenile delinquency			
Law enforcement			

ONLINE BIBLIOGRAPHIC DATA BASES

NATIONAL NEWSPAPER INDEX

National Newspaper Index, produced by Information Access Corporation, is available online as part of the Lockheed data base system, and provides front-page to back-page indexing on current affairs topics of the Christian Science Monitor, New York Times and Wall Street Journal. Searching may be performed either using the basic index, which includes any assigned terms or meaningful individual words, or the additional indexes which provide access to such information as journal name, date, edition and other bibliographic information.

NEXIS

The NEXIS library provides access to wire service articles from the Associated Press, United Press International, and Reuters, articles from the Washington Post, and journal articles. The journals indexed include the Congressional Quarterly Weekly Report, Newsweek, and U.S. News and World Report. In addition to providing citations and abstracts of the materials included in the data base, NEXIS makes the full text of the articles available online. NEXIS also provides access to the New York Times Information Bank, which is a current affairs data base containing citations to the New York Times and over sixty newspapers and journals.

NEWSSEARCH

Newssearch is the daily update of Magazine Index, National Newspaper Index, and Legal Resource Index in the Lockheed data base system. It provides front-page to back-page indexing of the Christian Science Monitor, Wall Street Journal, and New York Times, as well as popular magazines, law journals, and legal newspapers.

GOVERNMENT PUBLICATIONS

PRINTED INDEXES

For information on identifying pertinent congressional hearings, committee prints, reports and documents, see the Congressional Publications section of this research guide.

MONTHLY CATALOG OF UNITED STATES GOVERNMENT PUBLICATIONS

The Monthly Catalog lists documents issued by all branches of the Federal Government. It provides citations to reports, studies, fact sheets, maps, handbooks, conference proceedings, and congressional publications; it has monthly, semiannual, and annual indexes by author, title, subject, key words, and series/report title. The Monthly Catalog is also available online through the Lockheed Dialog system.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Court administration	Criminal investigation	Civil procedure	Criminal courts
Court congestion and delay	Criminal liability		Criminal law
Court rules	Law enforcement		Criminal procedure
Courts	Police		Jury
Crime and criminals			Jury selection
Criminal behavior, Prediction of			
Criminal justice, Administration of			
Criminal statistics			
Judges			
Justice, Administration of			
Juvenile correction			
Juvenile courts			
Juvenile delinquency			
Juvenile justice, Administration of			
Law			
Law reporting			

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS

The *Weekly Compilation of Presidential Documents* contains statements, messages, and other presidential materials released by the White House during the preceding week. The *Weekly Compilation* has weekly, quarterly, and annual indexes. Key search terms for this topic are LAW ENFORCEMENT AND CRIME and JUSTICE, DEPARTMENT OF.

INDEX TO U.S. GOVERNMENT PERIODICALS

The *Index to U.S. Government Periodicals* provides a cumulative index to the articles of research value in the periodicals produced by more than one hundred agencies of the U.S. Government.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Constitutional law	Criminal investigation	Courts	Courts
Courts	Police		Juries
Courts of appeals			Justice, Administration of
Crime and criminals			
Criminology			
Judges			
Judicial review			
Jurisdiction (Law)			
Justice, Administration of			
Justice, Department of			
Juvenile delinquency			
Law			
Law enforcement			

ORGANIZATIONS

The following is a sampling of those organizations which may be possible sources of information on judicial reform and related issues. They were selected from the Encyclopedia of Associations and the Washington Information Directory, 1982-1983. The descriptions of the groups' activities were also taken from these sources. Additional organizations may be located in these sources by using such search terms as Legal, Judges, Judicial, Criminal, and Police.

In addition to the organizations listed below, researchers may also contact the National Referral Center to obtain descriptions of organizations qualified and willing to answer questions or provide information on social science and science topics.

National Referral Center
Library of Congress
Washington, DC 20540
(202) 287-5670

Organization	Description
Administrative Office of the U.S. Courts 811 Vermont Ave., NW Washington, DC 20544 (202) 633-6097	"Supervises all administrative matters of the United States court system (except the Supreme Court)."
Alliance for Justice 600 New Jersey Ave., NW Washington, DC 20001 (202) 624-8390	"Nonprofit organization that assists public interest law firms with funding problems, especially with attorneys' fee awards. Works to increase citizen participation in the Judicial and administrative processes."
American Bar Association 1155 E. 60th St. Chicago, IL 60637 (312) 947-4000	Professional membership organization for attorneys which oversees the Code of Professional Responsibility and is actively involved in efforts to improve court procedure.
American Bar Foundation 1155 E. 60th St. Chicago, IL 60637 (312) 667-4700	Aims "to study, improve, and facilitate the administration of justice; promote the study of law and legal research; . . . and improve legal education."

Organization	Description
American Civil Liberties Union 132 W. 43rd St. New York, NY 10036 (212) 944-9800	"Champions the rights of man set forth in the Declaration of Independence and the Constitution," including freedom of speech, due process of law, trial equality before the law, and so forth. Publications: First Principles, monthly; Civil Liberties, bimonthly
American Enterprise Institute for Public Policy Research 1150 17th St., NW Washington, DC 20036 (202) 862-5800	Aims are "to assist policy makers, scholars, businessmen, the press, and the public by providing objective analyses of national and international issues."
American Judges Association P.O. Box 1399 188 Chestnut St. Holyoke, MA 01040 (413) 534-1506	"Seeks to improve the administration of justice at all levels of the courts."
American Judicature Society 200 W. Monroe St., Suite 1606 Chicago, IL 60606 (312) 558-6900	Fosters an interest on the effective administration of justice. "Conducts research; offers a consultation service: sponsors and organizes citizens' conferences on judicial improvement." Serial publication: Judicature
American Justice Institute 1007 Seventh St. Sacramento, CA 95814 (916) 444-3096	Aims "to help institutions and individuals become more willing and able to reduce the occurrence of crime, delinquency and related social problems."
American Law Institute 4025 Chestnut St. Philadelphia, PA 19104 (215) 243-1600	"Promotes the clarification and simplification of the law and its better adaptation to social needs by continuing work on the Restatement of the Law, model and uniform codes and model statutes."
American Society of Criminology 1314 Kinnear Rd. Columbus, OH 43212 (614) 422-9207	Aims "to develop criminology as a science and academic discipline; to aid in the construction of criminological curricula in accredited universities; to upgrade the practitioner in criminological fields (police, prisons, probation, parole, delinquency workers)."

Organization	Description
Association for Correctional Research and Information Management c/o Dr. Thomas A. Johnson Dept. of Criminal Justice 106 Van Doren Hall Washington State University Pullman, WA 99164 (509) 335-3539	Aims "to provide and improve knowledge, experience, and leadership in the field of correctional research and statistics in prisons, jails and juvenile detention centers. Applies research data in the prevention, control and treatment of crime and delinquency."
Brookings Institution 1775 Massachusetts Ave., NW Washington, DC 20036 (202) 797-6000	"Nonprofit research and educational organization which examines issues and trends in public policy."
Center for Studies in Criminal Justice University of Chicago Law School 1111 E. 60th St. Chicago, IL 60637 (312) 753-2438	Aims are "to conduct research in current problems in the administration of justice; to train law students in social science research techniques; and to offer visiting fellowships to distinguished legal scholars."
Center for Studies in Criminology and Criminal Law 3718 Locust St., Rm. 203 Philadelphia, PA 19174 (215) 243-7411	"Conducts research on crime, delinquency, police judicial systems, prisons, social control and social deviance."
Citizens Legal Protection League P.O. Box 2115 Sanford, FL 32771 (305) 322-7011	"Objectives are to acquaint Americans with their right to use all courts in person without hiring a lawyer and to provide basic training in general court procedures, preparations for suits, answers to suits and motions."
Committee to Defend the First Amendment Research Institute 727 8th St., SE Washington, DC 20003 (202) 544-3332	Educational and research organization. Sponsors conferences and debates on the exercise and encroachment of First Amendment rights.

Organization	Description
Committee for Uniform Crime Records c/o International Association of Police Chiefs 13 Firstfield Road Gaithersburg, MD 20878 (301) 948-0922	"Evaluates methods used by police agencies in maintaining records and making reports relative to law enforcement." Recommends uniform crime reporting procedures.
Criminal Justice Archive and Information Network P.O. Box 1240 Ann Arbor, MI 48106 (313) 764-5199	Provides access to U.S. Bureau of Justice Statistics data topics and other criminal justice statistical information.
Criminal Justice Statistics Association 444 N. Capitol St., NW, Suite 305 Washington, DC 20001 (202) 347-4608	"Seeks to further the collection, analysis, dissemination and use of data concerning crime and criminal justice at the federal and state levels; to assist in the identification and transfer of techniques for analyzing criminal justice data."
Equal Justice Foundation 1346 Connecticut Ave., NW, Suite 525 Washington, DC 20036 (202) 452-1267	Aims are "to study and promote ways to make the judicial system more accessible, so that citizens may enjoy representation in the courts, governmental agencies, the legislature and other areas where public policy is made."
Friends of the FBI 1835 K St., NW, Suite 600 Washington, DC (202) 785-3830	"Conducts educational and research programs and disseminates knowledge about the F.B.I. and all other law enforcement organizations in the U.S."
HALT - An Organization of Americans for Legal Reform 201 Massachusetts Ave., NE, Suite 319 Washington, DC 20002 (202) 546-4258	"Aims to educate the public about law, legal procedures and legal services; . . . to simplify the language of the law; . . . and to improve the quality and reduce the cost of available legal services."
Heritage Foundation 513 C St., NE Washington, DC 20002 (202) 546-4440	"Conservative public policy research organization."

Organization	Description
Institute for Court Management 1624 Market St., Suite 210 Denver, CO 80202 (303) 534-3063	"Promotes judicial, procedural and administrative improvements in the courts."
Institute of Judicial Administration One Washington Square New York, NY 10012 (212) 598-7721	"Promotes judicial, procedural and administrative improvements in the courts."
International Association of Chiefs of Police 13 Firstfield Road Gaithersburg, MD 20878 (301) 948-0922	Provides consultation on aspects of police activity. Publications: Police Chief, monthly; Journal of Police Science and Administration, quarterly
Judicial Conference of the United States 811 Vermont Ave., NW Washington, DC 20544 (202) 633-6097	"Serves as the policy making and governing body for the administration of the Federal judicial system."
National American Indian Court Judges Association 1000 Connecticut Ave, NW, no. 401 Washington, DC 20036 (202) 296-0685	"Seeks to improve the American Indian court system throughout the United States by furthering knowledge and understanding of it and maintaining its integrity in providing equal protection to all persons." Publication: Indian Courts Newsletter, quarterly
National Association of Juvenile Correctional Agencies 36 Locksley Ln. Springfield, IL 62704 (217) 787-0690	"Disseminates ideas on the function, philosophy and goals of the juvenile correctional field with emphasis on institutional rehabilitative programs."
National Association of Women Judges 3580 Wilshire Blvd., Rm. 323 Los Angeles, CA 90010 (213) 736-2411	"Objectives are: to promote the administration of justice; to discuss and formulate solutions to legal, educational, social and ethical problems encountered by women judges; . . . and to discuss other issues particularly affecting women judges."

Organization	Description
National Bar Association 1773 T St., NW Washington, DC 20009 (202) 797-9002	"Interests include legal education and improvement of the judicial process."
National Center for Juvenile Justice 710 Forbes Ave. Pittsburg, PA 15219 (412) 227-6950	Aims "to encourage the progressive administration of juvenile justice and all its components by research and dissemination of pertinent data."
National Center for State Courts 300 Newport Ave. Williamsburg, VA 23185 (804) 253-2000	"Provides assistance to state and local trial and appellate courts in improving their structure and administration." Serial publication: State Court Journal
National Conference of Commissioners on Uniform State Laws 645 N. Michigan Ave., Suite 510 Chicago, IL 60611 (312) 321-9710	Aims "to promote uniformity in state law on all subjects where uniformity is deemed desirable and practicable; to draft uniform and model acts on subjects suitable for interstate compact; . . . and to promote uniformity of judicial decisions throughout the U.S."
National Council on Crime and Delinquency Continental Plaza 411 Hackensack Ave. Hackensack, NJ 07601 (201) 488-0400	Includes "social workers, correction specialists and others interested in community based programs, juvenile and family courts, and the prevention, control and treatment of crime and delinquency."
National Criminal Justice Association 444 N. Capitol St., NW, Suite 305 Washington, DC 20001 (202) 347-4900	"Provides a formal mechanism for the development and expression of unified state views on criminal and juvenile justice issues."
National District Attorneys Association 708 Pendleton St. Alexandria, VA 22314 (703) 549-9222	"Sponsors conferences and workshops on criminal justice; provides information on criminal justice, the courts and district attorneys."

Organization	Description
National Judicial College Judicial College Building University of Nevada Reno, NV 89557 (702) 784-6747	"Provides education and training for the nation's judges."
National Legal Center for the Public Interest 1101 17th St., NW Washington, DC 20036 (202) 296-1683	"Nonprofit public interest law center and information clearinghouse; does not litigate cases. Monitors legislation on the judiciary and judicial process; sponsors seminars."
National Moratorium on Prison Construction 324 C St., SE Washington, DC 20003 (202) 547-3633	"Engages in public education, lobbying, and direct action to stop construction of new prisons and jails; monitors and collects data on prison construction and incarceration; coordinates efforts in the U.S. to reduce use of incarceration and to seek systematic alternatives to imprisonment."
Supreme Court of the United States Office of Public Information U.S. Supreme Court Building Washington, DC 20543 (202) 252-3211	"Provides copies of court opinions, information on filing new cases and the status of pending cases, and information on admissions to the Supreme Court Bar."
U.S. Bureau of Justice Statistics c/o National Criminal Justice Reference Service Box 6000 Rockville, MD 20850	Provides information on statistical issues relating to the criminal justice system and provides copies of publications.
U.S. Department of Justice Public Affairs Office Main Justice Building Washington, DC 20530 (202) 633-2001	Answers inquiries from the public about Justice Department policies and programs.

Organization	Description
U.S. Federal Bureau of Investigation Public Information Office J. Edgar Hoover Building 9th St. and Pennsylvania Ave., NW Washington, DC 20535 (202) 324-3691	Answers inquiries from the public on Federal Bureau of Investigation policies and programs.
U.S. National Institute of Justice 633 Indiana Ave., NW Washington, DC 20531 (202) 724-2942	"Conducts research on all aspects of criminal justice, including crime prevention, enforcement, adjudication and corrections; evaluates criminal justice programs; develops model programs using new techniques; maintains National Criminal Justice Reference Service that provides document information on criminal justice research."
Vera Institute of Justice 30 E. 39th St. New York, NY 10016 (212) 986-6910	"Conducts action-research projects in criminal justice reform and in new approaches to helping people previously considered unemployable to move into the regular labor market."
Washington Legal Foundation 1612 K St., NW Washington, DC 20006 (202) 857-0240	"Nonprofit public interest law organization. Interests include constitutional law, election law, government regulation and freedom of information; litigates on behalf of victims of violent crimes who sue their attackers."

STATISTICAL SOURCES

AMERICAN STATISTICS INDEX (ASI)

The American Statistics Index indexes and describes the statistical publications of the U.S. Government, including periodicals, annual, biennial, semiannual, and special publications. The Index provides access to statistical materials by subject, organization, name, issuing source, and title. The Index is published monthly and cumulated quarterly and annually.

STATISTICAL REFERENCE INDEX

The Statistical Reference Index provides a guide and index to selected statistical reference material from non-Federal sources on a wide spectrum of subject matter. It includes the publications of trade, professional, and other nonprofit associations and institutions, business organizations, commercial publishers, university and independent research centers, and state government agencies. The Index provides access by subject, organization, name, issuing source, and title. The Index is published monthly and cumulated annually.

GENERAL	CRIMINAL INVESTIGATION	CIVIL COURTS	CRIMINAL COURTS
Administration of justice	Arrest	Civil procedure	Criminal procedure
Administrative Office of the U.S. Courts	Evidence	Claims	Juries
Correctional institutions	Law enforcement	Court of claims	Pretrial detention and release
Courts	Police		Sentences, Criminal procedure
Crime and criminals			
Crime index			
Crime insurance			
Department of Justice			
Due process of law			
Federal courts of appeals			
Federal district courts			
Federal Judicial Center			
Judges			
Judicial Conference of U.S.			
Judicial power			
Judicial reform			
Juvenile courts			
Juvenile delinquency			
Lawyers			
Parole and probation			
Supreme Court			
Trials			
Witness			

PUBLIC AFFAIRS INFORMATION SERVICE BULLETIN (PAIS)

Most of the search terms included in PAIS list citations under the subdivision, "Statistics." A description of this tool appears in the Journal Articles section of this guide, and appropriate search terms are listed.

BUREAU OF JUSTICE STATISTICS

The Bureau of Justice Statistics of the U.S. Department of Justice also provides information on statistical issues relating to the criminal justice system. Copies of Bureau of Justice statistics publications are available from:

National Criminal Justice Reference Service
Box 6000
Rockville, MD 20850

UNITED STATES GOVERNMENT PRINTING OFFICE
SUPERINTENDENT OF DOCUMENTS
WASHINGTON, D.C. 20402

SB-043
April 8, 1983

PUBLICATIONS RELATING TO THE 1983-84
HIGH SCHOOL DEBATE TOPIC

What Changes Are Most Needed in the Procedures Used in the United States Justice System?

* * * * * * * * * * * * *

___American Prisons and Jails, Volume 4, Supplemental Report, Case Studies of New Legislation Governing Sentencing and Release. 1981. 290 p. il.
J 28.2:P 93/2/v.4 S/N 027-000-01088-1 $ 8.00

___Challenge of Crime in a Free Society, A Report. *The report of the President's Commission on Law Enforcement and Administration of Justice.* 1967, reprinted 1976. 340 p. il.
Pr 36.8:L 41/C 86 S/N 040-000-00100-0 9.00

___Crime, Kidnapping, and Prison Laws, June 21, 1902-December 28, 1980. *A compilation of laws from June 21, 1902 through December 28, 1980.* 1981. 1134 p.
Y 1.2:C 86/981 S/N 052-001-00177-0 13.00

___Crime Scene Search and Physical Evidence Handbook. *Describes and illustrates methods for identifying, preserving, and processing criminal evidence.* 1973. 189 p. il.
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